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United States Court of Appeals

For the Second Circuit

In Bankruptcy No. 89554

In the Matter
of
SLEEP PRODUCTS, INC.,
Bankrupt.

LOCAL 140 SECURITY FUND, Claimant-Petitioner,
Appellant,

WILLIAM S. HACK, Trustee,
Appellee.

APPELLANT'S BRIEF AND APPENDIX

**On Appeal From the United States District Court
For the Southern District of New York**

RABINOWITZ & BOUDIN,
Attorneys for Appellant,
25 Broad Street,
New York 5, N. Y.

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LOCAL 140 SECURITY FUND, Claimant-Petitioner,

Appellant,

WILLIAM S. HACK, Trustee,

Appellee.

BRIEF FOR APPELLANT

Statement of the Case

This is an appeal from an order of the District Court for the Southern District of New York (Herlands, J.), dated April 6, 1956 (App. 74a), confirming an order of a Referee in Bankruptcy (App. 57a) disallowing a claim filed by the Local 140 Security Fund (claimant-appellant herein).

The record presents the question:

Are employer contributions to an employee welfare plan, made pursuant to a collective bargaining agreement, entitled to a priority as "wages" pursuant to § 64a(2) of the Bankruptcy Law [11 U. S. C. 104(a) (2)]?

Facts

There is no dispute regarding the facts, which were stipulated before the Referee and the Court below:

On August 15, 1952, the Bankrupt entered into a collective bargaining agreement with Bedding, Curtain & Drapery Workers Union, Local 140 of the United Furniture Workers of America, CIO (hereinafter referred to as Local 140) (App. 12a). The agreement, a copy of which is annexed to the stipulation as Exhibit "C" is, in form, a typical collective bargaining agreement (App. 32a ff.). It contains the usual terms regulating the hours, wages and working conditions of the employees covered by it. It sets forth customary provisions with respect to holidays, vacations, arbitration of grievances and similar matters.

Paragraph Thirty-second of the Agreement (App. 45a) provides that the Bankrupt was to pay to the claimant a sum equal to 6½% of the monthly gross payroll "for the purpose of financing a Security Plan for the benefit of the employees of the Employer within the bargaining unit. * * * It is understood that the social benefits to be provided will meet the requirements of all applicable laws and will satisfy the Employer's obligations under the New York State Disability Law, without further obligation on the part of the Employer."

The record further discloses that from time to time since 1950, Local 140 has entered into collective bargaining agreements with a number of employers in the bedding industry similar to the agreement entered into with the Bankrupt (App. 11a).

The nature of the claimant is described in the Stipulation of Facts. Claimant was organized on August 1, 1950 by virtue of an Agreement and Declaration of Trust, a copy of

which is annexed to the Stipulation as Exhibit "A" (App. 15a), for the purpose of financing various types of social insurance including life insurance, accident and health insurance, insurance for medical care and hospitalization, and disability benefit insurance (App. 11a).

Subsequently and on March 13, 1952, a second Trust Fund, the Local 140 Pension Fund, was created for the purpose of financing payment of retirement pensions. Since that date claimant has been paying over to the Pension Fund a portion of the sums received by it (App. 12a).

Although the agreement provides for monthly payments by the Bankrupt to the claimant, in fact the Bankrupt was delinquent in payment. For the three months period immediately preceding the filing of the petition in bankruptcy, the gross payroll amounted to $15,288.53. Of this sum 6½% or $993.75 was required to have been paid by the Bankrupt to the claimant for the purposes aforesaid. This money was in fact not paid and claimant filed a timely claim with the Referee claiming a priority on the ground that the payments constituted wages within the meaning of the Bankruptcy Act (App. 13a, 14a).

The Stipulation of Facts further discloses that by virtue of the contract between Local 140 and other employers, including the Bankrupt as aforesaid, insurance or benefits have been provided for members of Local 140 for life insurance, accident and health insurance, medical care insurance, hospitalization, disability benefits and, since 1952, pensions. The employees of the Bankrupt have enjoyed the insurance and pension benefits above referred to until the filing of the voluntary petition herein (App. 13a).

As appears from the stipulation (App. 13a), neither the Bankrupt nor any of the individual employees has any right, title or interest in the trust fund, except the right to insurance coverage and welfare benefits. No employee

has an option to receive any part of the employer's contribution in lieu of insurance benefits. The employer's contribution to claimant is not subject to the payment of income and/or withholding taxes by the employees.

The Statute

§ 64a(2) of the Bankruptcy Act reads as follows:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; * * * (2) wages not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; (3) * * *."

POINT I

§ 64a(2) should be liberally interpreted for the benefit of wage earners.

Priority for wage claims has been a feature of our bankruptcy laws for over a century. It first appeared in the Bankruptcy Act of 1841 (5 Stat. 440, 444). It was reenacted in the Bankruptcy Acts of 1867 (14 Stat. 517, 531) and 1898 (30 Stat. 544, 563). Despite many changes in the Act, the concept of providing priority for wages has remained constant and, indeed, has been greatly liberalized in the intervening years. In 1841, the limitation on wage claims was $25; that was later extended upward to $50, to

$300 and finally $600. Among the priority rankings, wages have moved upward until now the priority of wages is second only to that for administration costs. The class of persons covered by the Act has likewise been extended. 3 Collier on Bankruptcy, ¶ 64.01, 64.02 (14th ed., 1941).

The courts have consistently striven to interpret the Act to give the greatest degree of protection to wage earners. So they have resisted efforts to dilute that protection by including within its scope managerial and supervisory personnel. 6 Remington on Bankruptcy, § 2794 (5th Ed. 1952); *In re Pacific Oil & Meal Co.*, 24 F. Supp. 767 (S. D. Calif., 1938).

The purpose of the priority is well recognized; it is equally agreed that the statute is to be interpreted liberally to effectuate that purpose. Judge Learned Hand pointed out that the Statute was intended to benefit

> "those who could not be expected to know anything of the credit of their employer but must accept a job as it comes, to whom the personal factor in employment is not a practicable consideration." (*In re Lawsam Electric Co. Inc.*, 300 F. 736, D. C. S. D. N. Y. 1924.)

The Ninth Circuit Court has said:

> "Priority of payment was intended for the benefit of those who are dependent upon their wages, and who, having lost their employment by the bankruptcy, would be in need of such protection." (*Blessing* v. *Blanchard*, 223 F. 35, 37 C. C. A. 9, 1915.)

As the Supreme Court has pointed out:

> "The policy which dictated [the statute] was beneficent and might well induce a postponement of the claims, even of the sovereign, in favor of those

who necessarily depended upon their daily labor." *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U. S. 152, 160 (1912).

Judge Parker, in *Manly* v. *Hood*, 37 F. 2d 212 (C. C. A. 4, 1930), observed, at page 214:

> "It is well settled that provisions of the Bankruptcy Act giving priority to claims for wages due employees are to be liberally construed."[1]

And see *In re Roebuck Weatherstrip and Wire Screen Co.*, 180 F. 497 (S. D. N. Y., 1910).

POINT II

Payments to the Local 140 Security Fund constitute wages within the meaning of the Act.

A.

Prior to June, 1955, employer payments into insurance plans created by collective bargaining agreements had been, so far as we have been able to ascertain, uniformly regarded as wage claims entitled to priority under § 64a(2) of the Act. There had been no District Court decisions on the matter and not many written opinions by Referees in Bankruptcy, but the few opinions we have been able to locate had all upheld the claim of priority.

Apparently the first decision on the subject was that of Referee Joyce in *Matter of 534 Catering Corp.*, No. 84856, in the Southern District of New York on Sept. 21, 1949. His opinion is unreported; it reads as follows:

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[1] In refusing to follow the extremely liberal construction of the time limitation adopted in *Manly* v. *Hood*, this Court, in *Strom* v. *Peikes*, 123 F. 2d 1003 (1941), nevertheless noted, at p. 1004, "* * * the strong arguments of equity and liberality towards wage earners * * *."

"The question presented is whether the required contributions accruing within three months before the date of Bankruptcy, November 26, 1946, are wages within the meaning of Section 64a(2) of the Bankruptcy Act (11 USC 104). The term means compensation or reward for services rendered; In re New England Thread Co., 158 Fed. 788, 792; In re Thomas Deutschle & Co., 182 Fed. 430, 431. It includes vacations; In re Wil-low Cafeterias, Inc., 111 F. (2d) 429; and severance pay; In re Public Ledger, 161 F. (2d) 762).

"The trustee urges that the present case differs because no part of the contribution is payable to or demandable by the employee, although he is entitled to receive the benefits which the funds are designed to provide. The fact remains, nevertheless, that the services of the employee constitute the entire considgration for the employer's payments to the fund. The form or character of the consideration given or promised by the employer is unimportant so long as it represents compensation for the services of the employee. Priority is allowed to the first named claimant in the sum of $146.40 and to the other in the amount of $68.25 (N. Y. Sept. 21, 1949)."

For the following six years, Referees in Bankruptcy in the Southern District had, as a matter of practice, followed the precedent set by Referee Joyce, although no further opinions seem to have been written on the subject. Moreover, on November 18, 1949, Referee Woodridge, sitting in the District Court for the Western District of Michigan, followed Referee Joyce's opinion in a much lengthier and more closely reasoned opinion in *Matter of Berkey & Gay Furniture Co.*, Bankruptcy No. 10,008. He referred to Referee Joyce's opinion as the only one on the subject and

after citing and quoting from many of the cases discussed hereinbelow, said:

> "When the above statute and cases are analyzed the inescapable conclusion is reached that 'wages' can mean something other than direct remuneration on an hourly or piece-work basis times a rate, and that the presence of the employee under the relationship of master and servant in the restricted sense that these terms are used in the Bankruptcy Act, may be sufficient to support benefits and that the same are entitled to payment as labor claims under Section 64-A-2. These may be vacation pay, severence pay, and as the Court believes, other benefits not payable in money but in things advantageous to and desirable for the affected employee. Given the fact of the employer-employee relationship, the fact that the collateral or additional benefits are founded upon and dependent upon that relationship, the same are labor claims, assuming, of course, as here, the other qualifications of the statute are met * * *."

In 1950, Referee Bachman, sitting in the Eastern District of Pennsylvania, decided two cases raising the same problem, holding, as had Referees Joyce and Woodridge, that claims by an insurance fund were entitled to a priority. These cases were *In the Matter of Ehrlich and Meyers, trading as Youth Star Sportswear*, Bankruptcy No. 23,003 and *Matter of Westbury Stylists, Inc.*, Bankruptcy No. 23,058. Neither case has been officially reported. The two opinions are similar, although not identical, and rely on some of the decisions referred to in the *Berkey & Gay* matter, but neither Referee Joyce's opinion nor that of Referee Woodridge are referred to and it does not appear that either case was called to the attention of the Referee.

In the District Court for the Southern District of California in 1953, Referee Hunt decided *In re Schmidt* and *In re Scheibler*, Bankruptcy Nos. 55,561-T and 55,560-T respectively (reported in 33 LRRM 2283), again holding that employer contributions were entitled to a priority under the Act. He said:

> "The 6¼c per hour to be contributed by the employer would not have arisen if the employer had not hired workmen and been bound under this union labor contract to make its contribution."

Finally, the District Court for New Jersey, Referee Cahill came to the same conclusion in a memorandum dated July 5, 1955 in *In the Matter of Fidelity Tube Corporation*, Bankruptcy No. 504-53.

So, as of July 1955, Referees in Bankruptcy, sitting in New York, Michigan, Pennsylvania, New Jersey and California, had, in seven known cases, decided this issue favorably to the claimant. The first dissent was voiced by Judge Brennan in *Matter of Brassel*, 135 F. Supp. 827 (D. C. N. D. N. Y., 1955), who held that such employer contributions to union welfare funds were not entitled to priority. Judge Brennan's decision was followed by the decision in the instant case.

Although the amount involved is not a substantial one, an appeal has been taken because the question is an important one in the administration of the Act and undoubtedly will become more important with the passage of time.

B.

Our industrial society has been a dynamic one and it is inevitable that both the amount and nature of wages paid to wage-earners should have undergone constant change in the one hundred eighty years of our existence. Additional change is certain to occur in the future.

In the Revolutionary era "in addition to money wages, the employment contract often included diet and rum" (Morris, Government and Labor in Early America, 1946, p. 210). Indeed, liquor was invariably a part of the wage contract in out-of-door occupations. Room and board or lodging were major elements of wage payments a century ago. In agricultural areas, from Revolutionary days, the farmhand was occasionally given a share of the crop as wages (*ibid*).

A century ago wage rates were commonly calculated on a daily basis. Today these rates have been translated into an hourly basis and this, in turn, has been further supplemented by piece work and incentive bonus systems.

In more recent times a whole series of "fringe" benefits, all part of the payment for work performed have become part of the wage contract. Included in such fringe benefits are Christmas or annual bonuses, attendance rewards, paid vacations, paid holidays, sick leave, severance pay, cost-of-living increments, reimbursement for jury service, profit-sharing, pensions, guaranteed annual wage and a wide variety of insurance payments. Both employers and employees have always regarded such benefits as part of the compensation for labor performed. To the employer they represent a cost of employment just as real as the hourly rate; to the employee they represent a form of compensation just as real as the weekly pay check.

With many of these elements of the wage contract the Bankruptcy Law need have no concern, since it is most unlikely that a default in payment would occur. Contracts which, for example, call for board and lodging as part of the worker's compensation could not present a problem for the bankruptcy court because default in such payments would be most unlikely. We think, however, that with respect to forms of compensation in which a default is possible, the bankruptcy law is sufficiently flexible in its

present form to provide the protection which, as a matter of policy, Congress has determined should be afforded to the wage-earner.

As a matter of fact, historically speaking, the courts have, without much hesitation, viewed "wages" realistically. And as this Court said in *In re Gurewitz*, 121 F. 982 (1903):

> "It surely could not have been the purpose of Congress to make the method of computation a criterion of priority."

At about the turn of the century, incentive and piece work payments became a prominent feature of industrial society. It was inevitable that the courts should have passed upon the question of whether such payments were "wages" within the meaning of the Act. In *In re Gurewitz, supra*, this Court found that such payments were within the Act, saying:

> "There is nothing ambiguous about the use of the word 'wages' in this connection. It means the agreed compensation for services rendered by the workmen, clerks or servants of the bankrupt—those who have served him in a subordinate or menial capacity and who are supposed to be dependent upon their earnings for their present support. Whether their employer has agreed to pay them by the hour, the day, the week, the month or by the 'job' or piece, is wholly immaterial.
>
> "It is incredible to suppose that Congress intended to discriminate against the vast army of laborers who, in the coal mines, the foundries, the clothing manufactories and in almost every branch of industry, are paid, not according to the time consumed, but according to the work accomplished."

The rationale of this decision was echoed a few years later by the United States Circuit Court of Appeals for the

First Circuit, which again pointed out that the term "'wages' must be construed in its broader and more general sense as meaning compensation for services rendered, since to hold otherwise would lead to glaring inconsistencies and manifest injustice." *In re New England Thread Co.*, 158 F. 788, 792 (1907).

The inclusion of vacation pay within the term "wages" as used in the Bankruptcy Act became an important issue in the 1940s [2] when a series of decisions held, without significant exception, that vacation pay was included. *In re Wil-low Cafeterias, Inc.*, 111 F. 2d 429 (C. C. A. 2, 1940); *In re Public Ledger*, 161 F. 2d 762 (C. C. A. 3, 1947); *Division of Labor Law Enforcement, State of Calif.* v. *Sampsell*, 172 F. 2d 400 (C. A. 9, 1949); *In re Kinney Aluminum Co.*, 78 F. Supp. 565 (S. D. Calif., C. D., 1948); *In re Red, White & Blue Litho, Inc.* (C. C. H. Bankruptcy Decisions, ¶ 58, 151; D. C. S. D. N. Y., 1954).

Severance pay was the next fringe benefit brought to the attention of the courts. There, too, it was held uniformly that such payments came within the definition of wages. *In re Public Ledger, supra; In re Elliott Wholesale Grocery Co.*, 98 F. Supp. 1017 (S. D. Calif., 1951), affirmed *sub nom, McCloskey* v. *Division of Labor Law Enforcement*, 200 F. 2d 402 (C. A. 9, 1952).

Back pay awards under the National Labor Relations Act were also construed as wages which had been "constructively earned" and therefore entitled to priority. *NLRB* v. *Killoren*, 122 F. 2d 609 (C. A. 8, 1941), cert. den. 314 U. S. 696 (1941).

We have already noted that Referees in Bankruptcy have extended the protection of § 64a(2) to employer con-

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[2] Actually the first case on the subject seems to have been *In re B. H. Gladding Co.*, 248 F. 605 (D. C. R. I., 1903). But the issue does not seem to have arisen again until about 1940.

tributions to security funds beginning with Referee Joyce's decision in 1949. Of course, the Bankruptcy Act is not the only statute in which the word "wages" is used and the courts in interpreting the National Labor Relations Act have come to the same conclusion. The leading case on the subject is *Inland Steel Co.* v. *NLRB*, 170 F. 2d 247, 251 (C. A. 7, 1948), cert. den. 336 U. S. 960 (1949). There the Court said:

> "• • • we are convinced and find that the term 'wages' as used in Section 9(a) must be construed to include emoluments of value, like pension and insurance benefits, which may accrue to employees out of their employment relationship. • • • Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure • • •."

Again, in *Cross & Co.* v. *NLRB*, 174 F. 2d 875, 878 (C. A. 1, 1949), the Court said:

> "At least, without attempting to mark the outer boundaries of the meaning of the word 'wages' • • • we think it can safely be said that the word 'wages' in Sec. 9(a) of the Act embraces within its meaning direct and immediate economic benefits flowing from the employment relationship. And that is as far as we need to go, for so construed the word covers a group insurance program for the reason that such a program provides a financial cushion in the event of illness or injury arising outside the scope of employment at less cost than such a cushion could be obtained through contracts of insurance negotiated individually."

And see also *NLRB* v. *Stackpole Carbon Co.*, 128 F. 2d 188 (C. C. A. 3, 1942), relating to insurance rights as wages; *Black Clawson Co.*, 103 NLRB 928 (1953), in which par-

ticipation in a profit sharing plan was held to be wages; *NLRB* v. *Bemis Bros. Bag Co.*, 206 F. 2d 33 (C. A. 5, 1953), in which it was held that rent might be part of wages.

C.

Insurance and pension funds paid for by the employer have become a most important part of current collective bargaining. This can best be illustrated by noting the phenomenal rise of employer-supported insurance and pension programs in the past few years. As of two years ago, more than eleven million workers (excluding Government and railroad employees) were covered by welfare and/or pension plans by virtue of union contracts. This is more than twenty times greater than the half million workers so covered a mere ten years ago. See Rowe, "Health Insurance and Pension Plans in Union Contracts", Monthly Labor Review, September, 1955, p. 993. No doubt, in the two years since, several millions of additional workers have been so covered.

The preponderance of union contracts providing for the establishment of insurance and pension plans calls for such plans to be supported exclusively by employer contributions. In 1954, 62.1% of the workers participating in insurance plans were covered by plans so financed. In the pension field this proportion was even greater. 84.7% of all employees covered by pension plans enjoyed such coverage exclusively at the expense of their employers. Thus, the plans here under consideration are typical. See Rowe, *supra*, p. 995.

This Court said in the *Wil-low* case, *supra*, at page 432:

> "Vacation with pay is in fact additional wages. It involves a reasonable arrangement to secure the well-being of employees and the continuance of harmonious relations between employer and employee. The consideration for the contract to pay for a week's vacation had been furnished, that is to say, one week's service had been rendered."

Precisely the same thing is true with respect to employer contributions to insurance and pension programs. The protection so afforded is regarded by both employers and employees as compensation for work performed.

Nowhere is this more clearly recognized than in the actual course of collective bargaining. Employers necessarily calculate the total cost of the union contract, including the cost of fringe benefits such as pension and welfare contributions, in determining what offer to make and what agreement to sign. Labor relations consultants advise employers—

> "* * * to evaluate union proposals for a program in terms of 'cents per hour' for, obviously, the company experiences such costs currently * * *." (Schwartz, "Pension & Retirement Programs", 1 Lab. L. J. 25, 28 (1949).)

Newspapers of general circulation, as well as specialized publications, habitually refer to the cost of a trade union "package" in terms of the "cents-per-hour" cost. See, *e.g.*, press reports on the settlement of the recent steel strike, in which the "package" included increased insurance and pension benefits. The cost was estimated by the union at 45.6 cents an hour and by the companies at 52 to 55 cents an hour (Wall St. Journal, July 30, 1956, p. 2).

Publications devoted to consideration of labor relations frequently use such formulations in discussing health, welfare and pension plans. See, *e.g.*, 37 L. R. R. 370 and especially 388 where there appears considerable discussion of the nine cents per hour steel industry insurance plan negotiated in 1954.

A recent symposium on "Wage Policies of the Wage Stabilization Board" in 7 Ind. & Lab. Rel. Rev., 175 ff. (1954), consisted of six articles, two of which were devoted to "Stabilization of Fringe Benefits" and "Health, Welfare

and Pension Plans under Wage Stabilization." An expert in the field noted that the term "fringe benefits" is used to denote "all forms of employee compensation other than basic straight time wage and salary rates" and commented further that in the past decade the growth of such supplementary features in the system of wage payments has reached "the point where they are no longer out on the fringes but very much at the center of the employment contract." 7 Ind. & Lab. Rel. Rev., *supra*, 221.

Contributions to an insurance plan provide current, immediate and direct benefit to the employees covered.[3] Insurance protection is a valuable right whether or not the insured actually suffers a compensable loss. Millions of people who never expect to collect on insurance policies and who earnestly hope that they never will collect, nevertheless purchase insurance every year because it provides them with security which is as real as a bank balance. The receipt of this protection through the employer's contribution to the Security Fund is as immediate and direct as the payment of vacation benefits or holiday pay. Cash realization upon the insurance policy is, of course, contingent upon the suffering of a disaster insured against, but the protection given by the policy is not contingent but present and realized.

That the insurance and pension rights were regarded by the parties as present rights is recognized in the stipulation of facts which reads, in paragraph 10, as follows:

> "10. Beginning with that date and until the filing of the voluntary bankruptcy petition herein, the employees of the bankrupt have enjoyed the insurance and pension benefits provided by Claimant and by the Local 140 Pension Fund" (App. 13a).

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[3] The Court below apparently thought differently and referred to insurance benefits as deferred rights. See our discussion in subdivision D below.

Pension payments provided by the Local 140 Pension Plan are, it is true, contingent and deferred. They are contingent upon an employee being in the industry long enough to reach the age of retirement, and deferred in that benefits are not paid until after retirement. Nonetheless, it is universally recognized that "pensions or retiring allowance paid because of past services are one form of compensation for personal service." *Hooker* v. *Hoey*, 27 F. Supp. 489, 490 (S. D. N. Y., 1939). As another Court said:

> "* * * It is not necessary to discuss the economic benefit contributed by the pensioners or to determine its present status, since here the express language of the labor contract makes the payment of the pensions a part of the consideration for the day to day efforts of the employees. The hourly rate of pay, the provision for vacation pay, seniority rights, the settlement of grievances, are all a part of the benefits received by the worker. They are a part of the reward for his effort; a part of his wage, * * * and this Court is not justified in attempting to separate or isolate the elements which go to make up the total benefits. They are all in one package." (*In re Schenectady Ry. Co.*, 93 F. Supp. 67, 70 (N. D. N. Y., 1950.)

It may be reasonably anticipated that the growth of welfare and pension plans through collective bargaining contracts will continue and that more and more workers will choose to take a portion of their compensation either in insurance protection against some form of insurable disaster or in the form of contingent and deferred compensation in the form of pensions, rather than in payment of money. Because such choice provides some measure of protection against the insecurity of illness and old age, it is, by most, regarded as a wise choice, socially desirable, and certainly to be encouraged.

Judge Augustus N. Hand in the *Wil-low* case, *supra*, said at page 432:

> "A vacation with pay is in effect additional wages. It involves a reasonable arrangement to secure the well-being of employees and the continuance of harmonious relations between employer and employee."

Recognition of welfare plans as a socially desirable arrangement was recognized by the Court in *United Marine Division* v. *Essex Transportation Co.*, 216 F. 2d 410, 411 (C. A. 3, 1954):

> "We approach the question with the thought in mind that these welfare funds represent a social device to be encouraged."

Just as the courts held that the Bankruptcy Law of 1903 was flexible enough to cover incentive wages, and just as the courts in the 1940s held that the Bankruptcy Law was flexible enough to cover vacation and severance pay, so the courts today should interpret the statute as flexible enough to cover the security and pension fund contributions here under consideration.

D.

We feel that the opinion of the Court below missed the basic issue raised by the record. Great reliance was placed by the District Court on the fact that the employer contributions to the fund are not considered wages in computing withholding and social security taxes (App. 64a, 65a). This, of course, is quite true but the Internal Revenue Code, the Federal Insurance Contributions Act and the Federal Unemployment Tax Act all specifically define wages so as to exclude certain employer welfare contributions.[4] The

[4] 26 U. S. C. 1402 (d); 26 U. S. C. 3121 (a) (2); 26 U. S. C. 3306 (b) (2), respectively. A similar definition excluding employer contributions to welfare plans in calculating "regular rate of pay" in the Wage and Hour Law is contained in § 7d of that statute. 29 U. S. C. § 207 (d) (3) and (4).

specific exception of such contributions from the statutory definitions of "wages" indicates that they would be included within the definition but for the exception. Chief Justice Marshall, in *Brown* v. *Maryland*, 12 Wheat. 419, at 438, referred to

> "* * * a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the law giver, the thing excepted would be within the general clause, had the exception not been made * * *."

See also *Gibbons* v. *Ogden*, 9 Wheat. 1, 191.

In the absence of a similar exception in the Bankruptcy Act, we respectfully suggest that the Court below had no authority for reading into the Act exceptions which are explicit in other statutes.

The Court below also urged that the benefits receivable by the employees from the fund are "contingent and deferred" and "indirect" (App. 66a). We have already pointed out that the employer contributions to the welfare plan results in present insurance protection to the employees and that such protection is not contingent, deferred or indirect but is quite direct and certain, whether or not benefits are ever collected. Quite aside from this, however, it is obvious that wages may be either direct or indirect, contingent or vested, payable presently or deferred. The Statute uses the word "wages". It does not define wages as immediate and direct payment in cash to employees. Such a definition, indeed, would be an anomaly in our law.[5] We suggest that the Court below had no justification for reading into the Statute qualifications on the general and broad term used.

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[5] We know of no definition of "wages" anywhere in our statutes which so limits the term.

The Court below had some additional difficulty with the statutory requirement that the wages, which are the basis for the priority, must be "due to" workmen. This difficulty arises only from the reluctance on the part of the Court to recognize that the protection conferred by insurance is a current protection. The fact that the protection may not be immediately realizable in cash seems quite irrelevant.

POINT III

The Local 140 Security Fund is a proper claimant.

A second question is raised by the record as to the status of the claimant as one entitled to a claim as creditor. This point was not raised by the Trustee in Bankruptcy or by any of the persons objecting to allowance of the claim, nor was it considered by the Referee or the Court below. However, because the issue is implicit in the record, we shall discuss it briefly here.

The claimant here is not a workman to whom the wages were due, but the Security Fund to which the payments were to have been made. Some of the cases referred to above, which have held such claims valid, have considered this aspect of the situation and, giving the Act the liberal construction to which it is entitled, they held that the claimant is the equitable assignee of the wages and, as such, is entitled to press a claim. The discussion by the Referee in the *Berkey & Gay Furniture Company* case, *supra*, is here appropriate. Said the Referee:

> "The cases are numerous to the effect that a labor claimant may assign his interest before or after bankruptcy without the same losing its preferential character and such is precisely what was done here in essence when the bargaining agent of the Berkey & Gay Furniture Company employees (United Furni-

> ture Workers of America, Local 415) provided in its contract that 3% computed on the payroll total be paid over to the now claimant as an insurance fund for the local's employees. The claimant here is perforce that contract and the designation of the Berkey & Gay Furniture Company employees through the local, the cumulative labor claimant representing them to the extent of $7,000.00."

The same reasoning was followed in the *Schmidt* and *Scheibler* cases, *supra*, where the Referee said at 33 L. R. R. M. 2284:

> "The Trustee contends that, since these payments were not formally assigned to the Southern California Plasterers Institute by the employees, the Institute was not a proper claimant with respect to them. There is no question but that an assignee of a claim for wages earned within three months before the date of bankruptcy is entitled to priority payment under Section 64a(2) of the Bankruptcy Act. *Shropshire Woodliff & Co.* v. *Bush*, 204 U. S. 186, 17 ABR 77, 27 S. Ct. 178, 51 L. Ed. 436. It is true that there was not a formal assignment, but from the facts it can be stated that there was at least an equitable assignment by the employees."

The courts, in conformity with their liberal approach toward the entire question presented here, have, in analogous situations, held that persons other than the wage earner might present a claim. See, *e.g.*, *Nathanson* v. *NLRB*, 344 U. S. 25, and *NLRB* v. *Killoren*, 122 F. 2d 609 (C. C. A. 8, 1941), in which it was held that the National Labor Relations Board, in seeking to collect a back pay award from a bankrupt estate, was a "creditor" within the meaning of § 1(11) of the Bankruptcy Act. In the *Killoren* case, the

Court of Appeals held that the Board's status was "in the nature of a plenary trusteeship" (p. 612).

We do not know whether the status of the Security Fund as a claimant is seriously challenged by any of the parties to this proceeding. In any event, it seems that there is ample authority for holding that it has status sufficient to press the present claim.

CONCLUSION

The claim of the claimant should be allowed as a wage claim entitled to priority.

Respectfully submitted,

RABINOWITZ & BOUDIN,
Attorneys for Claimant,
25 Broad Street,
New York 4, N. Y.

APPENDIX

United States Court of Appeals

For the Second Circuit

In Bankruptcy No. 89554

—o—

In the Matter

of

SLEEP PRODUCTS, INC.,

Bankrupt.

LOCAL 140 SECURITY FUND, Claimant-Petitioner,

Appellant,

WILLIAM S. HACK, Trustee,

Appellee.

—o—

Statement Under Rule 15 (b)

This is a proceeding in bankruptcy instituted by the filing of a voluntary petition on August 3, 1953. Adjudication followed immediately thereafter. The claimant, Local 140 Security Fund, thereafter timely filed a claim against the estate of the bankrupt in the sum of $993.75, claiming a priority for said sum on the ground that the payments constituted wages within the meaning of the Bankruptcy Act. The claim was disallowed as a priority claim by an order of the Referee in Bankruptcy dated November 16, 1955. A timely application to review was made to the United States District Court which, in an order dated April 6, 1956, confirmed the Referee's order. A notice of appeal was filed on April 19, 1956.

Notice of Motion of Trustee for Order Disallowing and Expunging Claim of Local 140 Security Fund

(Record page 31)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that upon the annexed petition of William S. Hack, duly verified the 27th day of May, 1955, and upon all the proceedings heretofore had herein, the undersigned will move this Court before the Hon. Herbert Lowenthal, Referee in Bankruptcy, at Room 1600, United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 9th day of June, 1955, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order disallowing and expunging the claim of Local 140 Security Fund, heretofore filed herein, in the sum of $2,400.00, Claim No. 38, in the Office of the Referee herein, on the grounds that the bankrupt is not indebted to the said Local 140 Security Fund in that amount and that the claim of said Local 140 Security Fund is unliquidated and incapable of reasonable estimation or liquidation; and for an order disallowing and expunging the said claim as a priority claim, on the grounds that the same is not entitled to priority in payment as wages, and for such other and further and different relief as may be proper in the premises.

Dated: New York, May 31, 1955.

Notice of Motion of Trustee for Order Disallowing and Expunging Claim of Local 140 Security Fund

Yours, Etc.,

MEYER LINDENBAUM,
Attorney for Trustee,
Office & P. O. Address,
185 Madison Avenue,
New York 16, N. Y.

To:

LOCAL 140 SECURITY FUND,
80 East 11 Street,
New York, N. Y.

RABINOWITZ & BOUDIN, Esqs.,
Attorneys for Claimant,
25 Broad Street,
New York 4, N. Y.

Petition of William S. Hack, Trustee, Read in Support of Motion

(Record pages 32-36)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

To the Honorable Herbert Lowenthal,
Referee in Bankruptcy:

The petition of William S. Hack respectfully alleges:

1. That he is the trustee herein duly qualified and acting.

2. That a voluntary petition in bankruptcy was filed by the above-named bankrupt on August 3, 1953 with the Clerk of this Court and an adjudication followed immediately thereafter.

3. That heretofore, Local 140 Security Fund, of 80 East 11th Street, New York City, filed a claim in the Office of the Referee in the sum of $2,400.00, alleging that the aforesaid sum of $2,400.00 is due to the claimant for work, labor and services rendered for the bankrupt within the three-month period immediately preceding the filing of the bankruptcy petition herein and claiming priority in payment as wages.

4. That petitioner, as trustee herein, objects to the allowance of the aforesaid claim on the following grounds:

(A) The said claim is not entitled to priority in payment as "wages, not to exceed $600.00 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks or traveling or city salesman on salary * * *" as provided in Section 64a.(2) of the Bankruptcy Act.

(1) That heretofore and on or about August 15, 1952, the bankrupt, Sleep Products, Inc., entered into a collective bargaining agreement with Bedding, Curtain & Drapery Workers' Union, Local 140, of the United Furniture Workers of America (hereinafter called the "Union").

(2) That paragraph "Thirty-second" of said agreement provided as follows:

> "The employer hereby agrees, as long as this agreement remains in effect, to pay monthly on or before the tenth day of each month, a sum equal to 6% of the monthly gross payroll of the employees in the bargaining unit, to Local 140 Security Fund, for the purpose of financing a Security Plan for the benefit of the employees of the Employer within the bargaining unit. At the same time the Employer shall forward a report setting forth the figures upon which payment is based.
>
> "Commencing February 15th, 1953, the Employer agrees to pay an additional one-half (½%) percent to the Local 140 Security Fund, the sum to be applicable to the Welfare provisions of the Security Fund, making it a total of six and one-half (6½%) percent.
>
> "The Employer further agrees to make the aforesaid monthly remittances to the Local 140 Security

Fund at its offices and that each monthly payment shall be based upon the gross payroll of the employees in the bargaining unit for the preceding month.

"It is understood that the social benefits to be provided will meet the requirements of all applicable laws and will satisfy the Employer's obligations under the New York State Disability Law, without further obligation on the part of the Employer.

"It is agreed that Local 140 Security Fund will be administered in compliance with the provisions of all applicable laws."

(3) That the aforesaid claim of Local 140 Security Fund in the sum of $2,400.00 is predicated upon the alleged indebtedness due from the bankrupt to Local 140 Security Fund under the above quoted paragraph of the collective bargaining agreement, dated August 15, 1952.

(4) That, upon information and belief, the payments due from the bankrupt under paragraph "Thirty-second" of the aforesaid agreement are not wages within the purview of the Bankruptcy Act, Section 64a.(2), but rather are payments made to satisfy the bankrupt's obligations under the New York Disability Benefits Law.

(5) That by reason of the foregoing, the claim of Local 140 Security Fund, Claim No. 38, filed herein, in the sum of $2,400.00, is not entitled to priority in payment as "wages", as provided in Section 64a.(2) of the Bankruptcy Act.

(B) *The bankrupt is not indebted to the claimant in the sum of $2,400.00.*

Petition of William S. Hack, Trustee, in Support of Motion

(1) The claim heretofore filed in this proceeding by Local 140 Security Fund seeks to recover the sum of $2,400.00 for work, labor and services rendered to the bankrupt within three months of the filing of the petition herein.

(2) That the basis of the aforesaid claim is the amounts due from the bankrupt under paragraph "Thirty-second" of the collective bargaining agreement above referred to.

(3) That, upon information and belief, the bankrupt is not so indebted to the claimant in the sum of $2,400.00 for the period of three months immediately preceding the filing of the petition in bankruptcy herein.

(4) That upon information and belief the aforementioned claim has not been reduced to judgment and is an unliquidated and fictitious amount that cannot be readily or reasonably estimated or liquidated.

WHEREFORE, petitioner respectfully prays for an order herein, disallowing and expunging the claim heretofore filed herein by Local 140 Security Fund in the sum of $2,400.00; and in the alternative, if it be determined by this Court that the bankrupt is indebted to the said claimant, for an order disallowing and expunging so much of the said claim as claims that the debt is entitled to priority in payment as wages; and for such other and further and different relief as to this Court may be just in the premises, for all of which relief no previous application has been made.

Dated: New York, May 27, 1955.

WILLIAM S. HACK,
Trustee.

(Verified by Trustee on May 27, 1955.)

Affidavit of John J. Lyden, Read in Support of Motion

(Record pages 37-40)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN J. LYDEN, being duly sworn, deposes and says:

1. I am a Tax Counsel in the office of the Corporation Counsel of the City of New York.

2. This affidavit is submitted by the City of New York in support of the motion and petition of Meyer Lindenbaum, attorney for the trustee, for an order disallowing and expunging the claim of Local 140 Security Fund as a priority claim on the ground that the said claim does not constitute wages due from Sleep Products, Inc., bankrupt.

3. The City of New York has filed an amended proof of claim in this matter under Reg. No. BX-30457, Claim No. 24431 for sales and general business taxes in the amount of $2,318.96. In the event that the claim of the Union should be allowed as a priority claim, the claim of the City would undoubtedly not be paid in full.

4. The said claim of the Union, pursuant to a collective bargaining agreement between the bankrupt and Bedding,

Curtain & Drapery Workers' Union, Local 140, of the United Furniture Workers of America, provided for payment of 6½% of the employer's gross payroll to the Union for the purpose of financing a security plan for the benefit of the employees. It is the contention of the City that the obligations arising from this agreement were that of debtor and creditor and that the said claim of the Union is not entitled to priority in payment as "wages not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks or traveling or city salesmen on salary * * *" as provided in Section 64a(2) of the Bankruptcy Act.

5. The payments in this case are not deducted from the salaries or wages of the employees, but are computed by taking 6½% of the gross payroll which is called for by the agreement with the Union.

6. Under the Debtor and Creditor Law of New York State, a new section, 22, effective July 1, 1952, was added in order to bring all benefits paid by the employer within the meaning of wages. There is no similar provision in the Bankruptcy Act which broadens the definition of "wages" to include all of these benefits. As a matter of fact in the computation of income taxes, the benefits paid by the employer to the Union are not included as compensation paid to the employees. Similarly, the unemployment insurance tax of New York State is computed only on the monies which are paid directly to the employee and not on additional benefits which are paid by the employer to a security fund.

WHEREFORE, the City of New York joins in the motion and requests that an order be granted disallowing and

expunging the claim of Local 140 Security Fund as a priority claim and that it be allowed only as a general claim against the debtor's estate.

JOHN J. LYDEN.

(Sworn to June 24, 1955.)

Stipulation of Facts

(Record pages 52-56)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

IT IS HEREBY STIPULATED, by and between the attorney for the Trustee and the attorney for Local 140 Security Fund (hereinafter referred to as the "Claimant"), in lieu of the taking of testimony in connection with the motion of the Trustee herein, commenced by petition duly verified May 27, 1955 and notice of motion dated May 31, 1955 for an order disallowing and expunging the claim heretofore filed herein by Claimant as a priority claim, as follows:

1. A voluntary petition in bankruptcy was filed by the above-named bankrupt on August 3, 1953 with the Clerk of this Court, and an order of adjudication was made and entered immediately thereafter.

2. The Claimant thereafter timely filed a claim against the estate of the bankrupt in the sum of $2,400.00, bearing

claim no. 38 in the Office of the Referee herein, alleging that the said sum was entitled to priority in payment as wages earned within the three-month period immediately preceding the filing of the petition herein, pursuant to Section 64 (a) (2) of the Bankruptcy Act.

3. Claimant was organized on August 1, 1950, by virtue of an Agreement and Declaration of Trust, a copy of which is annexed hereto as Exhibit "A". By the terms of that Agreement, Claimant was created for the purpose of financing various types of social insurance for employees in the bedding industry, including, but not limited to, life insurance, accident and health insurance, insurance for medical care and hospitalization, and disability benefit insurance.

4. Since the date of organization of Claimant, various employers have entered into collective bargaining agreements with Bedding, Curtain and Drapery Workers Union, Local 140, affiliated with the United Furniture Workers of America, CIO (hereinafter referred to as Local 140), by the terms of which agreements such employers have been paying sums of money to Claimant, based on the gross monthly payroll of employees covered by said collective bargaining agreements, in return for which Claimant has provided insurance covering such employees.

5. Insurance coverage under the aforesaid Agreement and Declaration of Trust extends to members of Local 140 only while they are working for an employer who is covered by a collective bargaining agreement between the employer and Local 140.

6. Among the types of insurance provided by Claimant under the aforesaid Agreement and Declaration of Trust

is disability benefit insurance on terms at least as favorable as those required by State law. By virtue of the aforesaid, employers who have entered into collective bargaining agreements with Local 140 that have provided for contributions to Claimant, have, by virtue of that fact, received from the State of New York exemption from paying the taxes provided by the Disability Benefits Law.

7. The Local 140 Pension Fund was organized on March 13, 1952, by virtue of an Agreement and Declaration of Trust, a copy of which is annexed hereto as Exhibit "B". By the terms of that agreement, the Local 140 Pension Fund was created for the purpose of financing the payment of retirement pensions for employees in the bedding industry. Since that date, Claimant has been paying over to the Local 140 Pension Fund certain portions of the moneys received from employers pursuant to the collective bargaining agreements above referred to.

8. To be eligible for pension benfits, an employee must be employed by an employer who is covered by a collective bargaining agreement with Local 140, or employers, for a specified number of years prior to the date of retirement. The amount of an employee's pension is determined by the number of years he is employed by employers covered by collective bargaining agreements with Local 140.

9. On August 15, 1952, the bankrupt entered into a collective bargaining agreement with Local 140, by the terms of which the bankrupt agreed to pay to the Claimant a sum equal to 6½% of the monthly gross payroll of employees covered by said collective bargaining agreement for the purpose of providing for the insurance and pension benefits above described. A copy of said agreement is annexed hereto as Exhibit "C".

10. Beginning with that date and until the filing of the voluntary bankruptcy petition herein, the employees of the bankrupt have enjoyed the insurance and pension benefits provided by Claimant and by the Local 140 Pension Fund.

11. Under the aforesaid Agreements and Declarations of Trust, neither the employer nor the individual employee have any right, title or interest in or to any part of the trust estate or fund so created, except such rights as might accrue to an employee under an insurance policy or for other welfare benefits.

12. Under the aforesaid Agreements and Declarations of Trust and the aforesaid collective bargaining agreements, no employee has an option to receive any part of the contribution of the employer in lieu of the insurance or pension benefits provided by the trustees.

13. The employer's contribution to the Claimant is not subject to the payment of income and or withholding taxes by the individual employee.

14. For some time prior to the filing of the petition herein, the bankrupt had been in default in making the payments to the Claimant, as required under the terms of the collective bargaining agreement, Exhibit "C" annexed hereto.

15. By the terms of the aforesaid collective bargaining agreement, the bankrupt was not required to and in fact never did hold such contributions or payments in trust or as a trustee for the Claimant.

16. The gross payroll of the bankrupt for employees covered by the collective bargaining agreement between

the bankrupt and Local 140, for the three-month period immediately preceding the filing of the petition herein, amounted to $15,288.53. Under the terms of the aforesaid collective bargaining agreement, Exhibit "C" annexed hereto, 6½% of that sum, or $993.75, was required to have been paid by the bankrupt to the Claimant for the purposes aforesaid. No part of said sum, in fact, was paid to Claimant, although payment was duly demanded.

17. Claimant claims a priority herein for wages under Section 64 (a) (2) of the Bankruptcy Act for said sum of $993.75, and the proof of claim heretofore filed by Claimant, Claim No. 38, shall be deemed amended to assert a priority claim in such amount only.

Dated: New York, September 19, 1955.

MEYER LINDENBAUM,
Attorney for Trustee.

RABINOWITZ & BOUDIN,
Attorneys for Claimant.

Exhibit A, Annexed to Stipulation of Facts

(Record pages 57-68)

AGREEMENT AND DECLARATION OF TRUST, dated August 1, 1950, by and between the Trustees of the Local 140 Security Fund:

WITNESSETH:

WHEREAS, the Bedding, Curtain & Drapery Workers' Union, Local 140 (herein called the "Union"), has executed, or will from time to time execute hereafter collective bargaining agreements or supplements to collective bargaining agreements with establishments in the Bedding, Curtain, Draperies, Venetian Blind and Allied Industries, which, among other things, provide for the payment of such Employers to the Local 140 Security Fund (herein called the "Fund"), periodically a sum of money equal to a stated percentage of the wages paid during the preceding month to those of its employees who are covered and entitled to the benefits of the collective bargaining agreement between the Employer and the Union; and

WHEREAS, the sums payable to the Fund as aforesaid (herein called the "employer contributions") are for the purpose of providing social insurance to the members of the Union employed in the various industries under its jurisdiction;

NOW, THEREFORE, in consideration of the premises, the Trustees declare that they will receive and hold the employer contributions and other money or property which may come into their hands as Trustees hereunder (all such employer contributions, money and property being herein called the "Fund Estate"), with the following powers and duties and for the following uses, purposes and trusts and none other, to wit:

Exhibit "A", Annexed to Stipulation of Facts

THE TRUSTEES

1. The Trustees, in their names as Trustees, shall have the power to demand, collect, receive and hold employer contributions and may take such steps, including the institution and prosecution of or the intervention in any proceeding at law, in equity, or in bankruptcy, as may be necessary or desirable to effectuate the collection of such employer contributions.

2. The Trustees shall deposit all monies received by them in such bank or banks as they may designate for the purpose and may invest and reinvest such funds as they do not require for current expenditure in such securities as are legal for the investment of trust funds under the laws of the State of New York.

3. The Trustees shall use and apply the Fund Estate for the following purposes:

(a) To pay or provide for the payment of all reasonable and necessary expenses of collecting the employer contributions and administering the affairs of this trust, including the employment of such administrative, legal, expert and clerical assistance, and the purchase or lease of such materials, supplies and equipment as the Trustees, in their discretion, find necessary or appropriate in the performance of their duties.

(b) To provide for social insurance including, but not limited to, life insurance, accident and health insurance, insurance for medical care and hospitalization insurance, as the Trustees shall determine, insuring employees who are covered by collective bargaining agreements containing such provisions and entitled to the benefits of such collective bargaining agreements between the Employers and the

Exhibit "A", Annexed to Stipulation of Facts

Union, or those who may properly come under the Fund, subject to such conditions as length of service in the industry, length and membership in the Union, and length of payment by the Employer of employer contributions as the Trustees may determine.

(c) To establish and accumulate such reserve funds as the Trustees in their discretion, deem necessary or desirable for the proper execution of the trusts herein created.

(d) The Trustees shall as part of the social security benefits to be provided for the employees covered hereunder, provide for disability benefits for the said employees, which shall be at all times at least as favorable as the disability benefits provided for by the New York State Disabiilty Benefits Law and shall provide for payment of the assessments thereunder to the end that the employer and employees covered hereunder shall be exempted from payments of such assessments.

4. Neither an Employer, an employee of an Employer, the Union, a member of the Union, or any person claiming by, through, or under any of them, shall have any right, title or interest in or to the Fund Estate or any part thereof, except the right of the member of the Union, or other person, who is covered by a policy of group insurance, or his beneficiary under such policy, to insurance benefits in the amount and subject to the terms and conditions specified in such policy. No employee shall have the option to receive, instead of the insurance benefits, any part of the contributions of the Employer. No employee shall have the right to assign the insurance benefits or any other benefits to which he may be entitled by reason of the Trust herein created, or to receive a cash consideration in lieu of such benefits either upon the termination of the Trust herein created or his withdrawal, through severance of employment or otherwise.

Exhibit "A", Annexed to Stipulation of Facts

5. (a) There shall be two trustees designated as hereinafter provided whose function shall be to administer the Security Fund in accordance with this Agreement and Declaration of Trust.

One of these Trustees shall be an Employer representative and shall be designated and appointed by the Employers signatory to the collective bargaining agreements with the Union, and one of these trustees shall be a Union representative and shall be designated and appointed by the Union.

It is specifically understood and agreed that the Union and Employers signatory to collective bargaining agreements with the Union shall at all times have equal representation in the Security Fund.

It is further specifically understood and agreed that as and when additional Employers and Associations of Employers agree under collective bargaining agreements to contribute to the Local 140 Security Fund, the number of Trustees may be increased to the extent deemed appropriate or desirable, but in no event to exceed a total of six Trustees. In such event, however, the principle of equal representation shall be maintained and for every additional Employer Trustee, the Union shall be entitled to an additional Union Trustee.

(b) The Trustees shall select one of their number from among the Union Trustees who shall act as chairman of the Trustees. So long as two Trustees shall constitute the Board of Trustees, the Chairman shall also act as Secretary-Treasurer.

(c) The Trustees shall select one of their number from among the Union Trustees who shall act as Secretary-Treasurer of the Trustees. The foregoing selection shall be made at such time as the number constituting the Board of Trustees shall exceed two.

Exhibit "A", Annexed to Stipulation of Facts

(d) A majority of the Trustees present in person at any meeting shall constitute a quorum for the transaction of business. So long as two Trustees shall constitute the Board of Trustees, the presence of one Trustee, in person, at any meeting shall constitute a quorum.

(e) Decisions of the Trustees shall be made by the concurring vote of a majority of all the Trustees present. The Chairman shall always have the right to vote. So long as two Trustees shall constitute the Board of Trustees, the Chairman shall be empowered to make decisions should his co-trustee fail or refuse to attend any meeting.

(f) The Chairman may call a meeting of the Trustees at any time by giving at least two (2) days written notice of the time and place thereof to each Trustee. Meeting of the Trustees may also be held at any time without notice if all the Trustees consent thereto.

(g) An Umpire shall be selected by the Trustees. The duties of said Umpire shall be solely and exclusively those of breaking any deadlock between the Employer Trustees and the Union Trustees whenever such deadlock shall occur. The Umpire shall not be entitled to exercise any of the powers of a Trustee except in the event of such a deadlock. He shall not be required or expected to attend meetings of the Trustees except when one or more Trustees specifically invites him to attend. He may, however, if he wishes, attend any meetings of the Trustees. He shall not have the right to vote at any meeting of Trustees except in the event of a deadlock between Employer and Union Trustees. He shall exercise the powers delegated to him in paragraph 11 below.

6. The Trustees shall not receive compensation for the performance of their duties as Trustees, but shall be reimbursed for all reasonable and necessary expenses which they incur in the performance of such duties. The cost

and expense of any suit or proceeding brought against the Trustees (including counsel fees) shall be paid from the Trust Estate.

7. The Trustees shall keep true and accurate books of account and records of all their transactions as Trustees, which shall be audited semi-annually by a certified public accountant.

8. All checks, drafts, vouchers or other withdrawals of funds from the account or accounts of the Fund Estate shall be countersigned by the Chairman and Secretary-Treasurer of the Trustees or by one of said officers and a Trustee to be designated for this purpose by the Trustees. So long as two Trustees shall constitute the Board of Trustees, all checks, drafts, vouchers or other withdrawals shall be signed by the Chairman of the Trustees.

9. (a) Each of the Trustees shall be protected in acting upon any paper or document believed by him to be genuine and to have been made, executed or delivered by the proper parties purporting to have made, executed or delivered the same and shall be protected in relying and acting upon the opinion of legal counsel in connection with any matter pertaining to the administration or execution of this Fund. The Trustees may rely upon an instrument in writing purporting to have been signed by, or upon telegrams purporting to have been transmitted by a majority of the Trustees as conclusive evidence of the fact that a majority of the Trustees have duly taken the action stated to have been taken in such instrument or telegram.

(b) No Trustee shall be liable for any action taken or omitted by him in good faith, nor for the acts of any agent, employee, or attorney selected by the Trustees with rea-

sonable care, nor for any act or omission of any other Trustee.

(c) The Trustees may delegate any of their ministerial powers or duties hereunder to any of their agents or employees, including one or more of the Trustees.

(d) The Trustees shall have the powe. to make rules and regulations not inconsistent with the terms hereof to carry out the provisions hereof.

(e) The designation of Trustees shall be in accordance with the provision of Paragraph 5 above. Each Trustee shall continue to serve until his successor is selected in accordance with the provisions hereof.

(f) Any Trustee may resign by instrument in writing executed for that purpose and delivered to the remaining Trustees.

(g) In the event of resignation, death, disqualification, disability, or refusal to act, of any Union Trustee, or any successor to a Union Trustee, a successor Trustee shall be designated by the remaining Union Trustees. In the event of the resignation, death, disqualification, disability, or refusal to act, of any Employer Trustee, or a successor of any Employer Trustee, a successor Employer Trustee shall be designated by the remaining Employer Trustees.

(h) Any successor Trustee appointed as hereinabove provided shall, upon the acceptance in writing of the terms of this Fund, be vested with all of the rights, powers and duties of his predecessor.

(i) No vacancy or vacancies in the office of Trustee shall impair the power of the remaining Trustees, acting in the manner hereinabove provided to administer the affairs of this Fund.

Exhibit "A", Annexed to Stipulation of Facts

10. (a) No party dealing with the Trustees in relation to this Fund shall be obligated to see to the application of any money or property of the Trust, or to see that the terms of this Trust have been complied with, or be obligated to inquire into the necessity or expediency of any act of the Trustees and every instrument executed by the Trustees shall be conclusive in favor of every person relying thereon.

1. That at the time of the delivery of said instrument the Trust hereby created was in full force and effect.

2. That said instrument was executed in accordance with the terms and conditions contained in this Trust Agreement.

3. That the Trustees were duly authorized and empowered to execute such instrument.

(b) The receipt given by the Trustees for any monies or other properties received by them shall effectually discharge the person or persons paying or transferring the same, and such person or persons shall not be bound to see to the application, or be answerable for the loss or misapplication, thereof.

AMENDMENTS

11. The provisions of this Agreement may be amended any time by a vote of a majority of the Trustees. In the event of a deadlock, the Umpire herein appointed shall be empowered to vote on such amendment; provided, however, that no amendment shall (1) alter the purpose of this Fund to provide for social insurance including life insurance, accident and health insurance, hospitalization insur-

ance, medical care insurance, pensions, and other similar forms of benefits for employees of contributing employers or their beneficiaries, or (2) eliminate or modify the provisions of Paragraph 4.

BONDING OF TRUSTEES

12. The Chairman and Secretary-Treasurer of the Trustees and the Trustees to be designated as provided in Paragraph 9, shall be bonded in the sum of ten thousand ($10,000.) dollars by a duly authorized surety company and the cost of the premiums of such bonds shall be paid out of the Trust Estate.

TERMINATION

13. In the event that the obligation of the Employers to make employer contributions shall terminate or upon the liquidation of the Fund Estate, the Trustees shall apply the Fund Estate, (1) to the purposes specified in Paragraph 3A, (2) to the purposes specified in Paragraph 3B, and (3) any balance which cannot be so applied to such other purposes as in the opinion of the Trustees will best effectuate the purposes hereof. Upon the disbursement of the entire Fund Estate, this Fund shall terminate.

Beginning with the day when the obligation of the Employer to make employer contributions shall have terminated, or upon a liquidation of the Fund Estate for any reason whatsoever, the decision of the Trustees shall be made by concurring vote of a majority of the Trustees.

14. This Trust is created and accepted in the State of New York and all questions pertaining to the validity or construction of this instrument and of the acts and transactions of the parties shall be determined in accordance with the laws of the State of New York.

Exhibit "A", Annexed to Stipulation of Facts

15. The Trustees, in their collective capacity, shall be known as the Local 140 Security Fund and may conduct the business of the Fund and execute all instruments in that name.

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AMENDMENTS TO AGREEMENT AND DECLARATION OF TRUST ADOPTED OCTOBER 16, 1950

It is hereby resolved that the Agreement and Declaration of Trust, dated August 1, 1950, be and the same hereby is amended as follows:

Article 3 is amended to add thereto a new subsection which shall read as follows:

(e) The Trustees may at such time as in their discretion seems advisable make provisions for the payment of pensions to members of the Union.

Article 9 shall be amended to add thereto a new subsection which shall read as follows:

(j) The Union Trustee must remain a member of the Union in good standing to continue to serve as Trustee. Any Union Trustee who shall fail to maintain such status, shall thereupon be disqualified from continuing to act as Trustee. The Employer Trustee must remain an Employer who shall be under contractual obligation to make employer contributions to the Fund, or the representative of such an Employer. Any Employer Trustee who shall fail to maintain such status shall thereupon be disqualified from continuing to act as Trustee. In the event of the disqualification of any Trustee, his successor shall be chosen pursuant to paragraph

Exhibit B, Annexed to Stipulation of Facts

(Record pages 69-76)

AGREEMENT AND DECLARATION OF TRUST dated the 13th day of March, 1952, by and between the undersigned Trustees:

WITNESSETH:

WHEREAS, BEDDING, CURTAIN & DRAPERY WORKERS UNION, LOCAL 140, has executed, or will from time to time hereafter execute, collec bargaining agreements or supplements to collective bargaining agreements with various employers, which contracts or supplements provide for the payments by employers to The Local 140 Security Fund periodically, of a sum of money equal to a stated percentage of the wages paid, during the preceding period, to those of its employees who are covered by and entitled to the benefits of the collective bargaining agreements between the employers and the Union; and

WHEREAS, The Local 140 Security Fund now desires, in addition to the benefits presently afforded employees on whose behalf payments are made, to provide for the payment of pensions, for said employees, and desires for that purpose to set up a separate trust fund to be known as The Local 140 Pension Fund:

NOW, THEREFORE, in consideration of the premises, there is hereby established a Pension Trust Fund to which will be contributed monies to be used exclusively for the purposes hereinbelow more fully set forth, and the Trustees hereby declare that they will receive and hold the Employer Pension Contributions and other money or property which may come into their hands as Trustees hereunder (all such Employer Pension Contributions, money or property being

herein called the "Pension Plan Estate") for only those purposes, and they shall have the following powers and duties in relation thereto as are set forth below.

1. The Trustees shall use and apply the Pension Plan Estate for the following purposes only:

(a) To pay or provide for the payment of retirements and annuities to employees on whose behalf contributions are or have been made; such payments to be in the amount and in accordance with terms and conditions adopted by the Trustees from time to time.

(b) To establish and accumulate such reserve funds as the Trustees, in their discretion, deem necessary or desirable for the proper execution of the Trusts herein created.

(c) To pay or provide for the payment of all reasonable and necessary expenses of collecting contributions and administering the affairs of this trust, including the employment of such administrative, legal, expert and clerical assistance, the purchase or lease of such materials, supplies and equipment as the Trustees, in their discretion, find necessary or appropriate in the performance of their duties.

2. The Trustees, in their names as Trustees, shall have the power to demand, collect, receive and hold contributions and shall have the power to take such steps, including the institution and prosecution of, or the intervention in, any proceeding at law, in equity, or in bankruptcy as may be necessary or desirable to effectuate the collection of such contributions.

3. The Trustees shall deposit all monies received by them in such bank or banks as they may designate for the purpose and may invest and reinvest such funds as they

do not require for current expenditure in such investments as are legal for the investment of trust funds under the laws of the State of New York.

4. Neither an employer, an employee of an employer, the Union, a member of the Union, or any person claiming by, through or under any of them, shall have any right, title or interest in or to the Pension Plan Estate or any part thereof, except the right of a member or his beneficiary, to the benefits of the Pension Plan as provided by the Trustees. No employee shall have the option to receive, instead of the benefits of the Pension Plan as provided by the Trustees. No employee shall have the option to receive, instead of the benefits provided by the Trustees, any part of the pension contributions of the employer. No employee shall have the right to assign the pension benefits or any other benefits to which he or she may be entitled by reason of the Trust herein created. No employee shall be entitled to receive a cash consideration, in lieu of the benefits provided by the Trustees either upon termination of the Trust herein created, or his withdrawal through severance of employment or otherwise.

5. (a) There shall be six (6) Trustees, whose function shall be to administer the Trust Estate in accordance with the Agreement and Declaration of Trust. Three (3) of these Trustees shall be Employer representatives and three (3) of these Trustees shall be employee representatives.

(b) The employee representatives (hereinafter referred to as "Employee Trustees"), shall be designated by the Union and shall hold office at the pleasure of the Union.

(c) The Employer representatives (hereinafter referred to as "Employer Trustees"), shall be those employer trustees who have executed this deed of trust, or

their successors. In the event of the resignation, death, disqualification, disability, or refusal to act, of any Employer Trustee, or a successor of any Employer Trustee, a successor Employer Trustee shall be designated by the remaining Employer Trustees.

(d) The Trustees shall select one of their Employer members who shall act as Chairman of the Trustees.

(e) The Trustees shall select one of their number who shall act as Vice-Chairman of the Trustees.

(f) The Trustees shall select one of their Employee members who shall act as Secretary-Treasurer of the Trustees.

(g) A majority of the Trustees present in person at any meeting shall constitute a quorum for the transaction of business.

(h) Decisions of the Trustees shall be made by the concurring vote of a majority of all the Trustees present.

(i) The Chairman or any two Trustees may call a meeting of the Trustees at any time by giving at least two (2) days' written notice of the time and place thereof to each Trustee. Meetings of the Trustees may also be held at any time without notice if all of the Trustees consent thereto.

(j) An Umpire shall be selected by the Trustees. The duties of said Umpire shall be solely and exclusively those of breaking any deadlock between the Employer Trustees and the Employee Trustees whenever such deadlock shall occur. The Umpire shall not be entitled to exercise any of the powers of a Trustee except in the event of such a deadlock. He shall not be required or expected to attend meetings of the Trustees except when one or more Trustees specifically invites him to attend. He may, however, if he

wishes, attend any meetings of the Trustees. He shall not have the right to vote at any meeting of Trustees except in the event of a deadlock between Employer and Employee Trustees.

6. The Trustees shall not receive compensation for the performance of their duties as Trustees, but shall be reimbursed for all reasonable and necessary expenses which they incur in the performance of such duties. The cost and expense of any suit or proceeding brought against the Trustees (including counsel fees) shall be paid from the Trust Estate.

7. The Trustees shall keep true and accurate books of account and records of all their transactions as Trustees, which shall be audited semi-annually by a certified public accountant. Reports on such audit shall be available at the office of the Plan for inspection by interested parties.

8. All checks, drafts, vouchers or other withdrawals of funds from the account or accounts of the Pension Plan Estate shall be countersigned by the Chairman and Secretary-Treasurer of the Trustees or by one of said officers and a person to be designated for this purpose by the Trustees.

9. (a) Each of the Trustees shall be protected in acting upon any paper or document believed by him to be genuine and to have been made, executed or delivered by the proper parties purporting to have made, executed or delivered the same, and shall be protected in relying and acting upon the opinion of legal counsel in connection with any matter pertaining to the administration or execution of this Plan. The Trustees may rely upon an instrument in writing purporting to have been signed by, or upon telegrams purporting to have been transmitted by a majority of the Trustees

as conclusive evidence of the fact that a majority of the Trustees have duly taken the action stated to have been taken in such instrument or telegrams.

(b) No Trustee shall be liable for any action taken or omitted by him in good faith, nor for the acts of any agent, employee, or attorney selected by the Trustees with reasonable care, nor for any act or omission of any other Trustee.

(c) The Trustees may delegate any of the ministerial powers or duties hereunder to any of their agents or employees, including one or more of the Trustees.

(d) The Trustees shall have the power to make rules and regulations not inconsistent with the terms hereof to carry out the provisions hereof.

(e) The designation of Trustees shall be in accordance with the provision of paragraph 5 above. Each Trustee shall continue to serve until his successor is elected in accordance with the provisions of said Paragraph 5.

(f) Any Trustee may resign by instrument in writing executed for that purpose and delivered to the remaining Trustees.

(g) Any successor Trustee appointed as hereinabove provided shall, upon the acceptance in writing of the terms of this Plan, be vested with all of the rights, powers and duties of his predecessor.

(h) No vacancy or vacancies in the office of Trustees shall impair the power of the remaining Trustees, acting in the manner hereinabove provided to administer the affairs of this Plan.

10. (a) No party dealing with the Trustees in relation to this Plan shall be obligated to see to the application of any

money or property of the Trust, or to see that the terms of this trust have been complied with, or be obligated to inquire into the necessity or expediency of any act of the Trustees and every instrument executed by the Trustees shall be conclusive in favor of every person relying thereon:

1. That at the time of the delivery of said instrument the Trust hereby created was in full force and effect;

2. That said instrument was executed in accordance with the terms and conditions contained in this Trust Agreement;

3. That the Trustees were duly authorized and empowered to execute such instrument.

(b) The receipt given by the Trustees for any moneys or other properties received by them shall effectually discharge the person or persons paying or transferring the same, and such person or persons shall not be bound to see the application, or be answerable for the loss or misapplication thereof.

11. The provisions of this agreement may be amended any time by a vote of a majority of the Trustees. In the event of a deadlock, the Umpire herein appointed shall be empowered to vote on such amendment. To the extent the Trustees find any modification or amendment necessary to bring the Plan into conformity with Governmental regulations, such amendment may be made, retroactively if necessary.

12. The Chairman and Secretary-Treasurer of the Trustees and the Trustees to be designated as provided in Paragraph 9, shall be bonded in the sum of Ten Thousand

($10,000.) Dollars by a duly authorized surety company and the cost of the premiums on such bonds shall be paid out of the Trust Estate.

13. The fund herein created shall be known as The Local 140 Pension Fund, and the Trustees may conduct all business and execute all instruments in that name.

IN WITNESS WHEREOF, the undersigned have set their hands and seals the 13th day of March, 1952.

(sgd) ALEX SIROTA
(sgd) SEYMOUR P. THALER
(sgd) MORRIS S. MOSKOVITZ

(sgd) BERNARD MINTER
(sgd) A. B. BELFER
(sgd) ARTHUR J. ORTNER

Exhibit C, Annexed to Stipulation of Facts

(Record pages 77-89)

AGREEMENT made this 15 day of August 1952, by and between BEDDING, CURTAIN & DRAPERY WORKERS' UNION, LOCAL 140, of the UNITED FURNITURE WORKERS OF AMERICA, hereinafter called the "Union", for and on behalf of itself and its members now employed or hereafter to be employed by the Employer and collectively designated as "Employees", having its principal place of business at 80 East 11th Street, Borough of Manhattan, City and State of New York, and Sleep Products Inc., having its principal place of business at 615 E 156 Str, Borough of Bronx, City and State of New York.

Exhibit "C", Annexed to Stipulation of Facts

WITNESSETH:

WHEREAS, both the Union and the Employer are mutually desirous of establishing the principle of collective bargaining in the Bedding Industry; and

WHEREAS, to the extent permitted by law the Employer is desirous of hiring members of the Union; and

WHEREAS, the Union is desirous of furnishing employees out of its membership to the Employer:

NOW, THERFORE, in consideration of the mutual covenants and agreements hereinafter contained, it is agreed by and between the Union and the Employer as follows:

FIRST: The Employer hereby recognizes the Union as the sole and exclusive bargaining agency for all of its employees, excepting office help, chauffeurs, non-working foremen, outside complaint men, salesmen and watchmen.

SECOND: (a) All present employees within the bargaining unit shall, thirty (30) days from the effective date of this agreement, become and remain members of the Union in good standing as a condition of continuing in the employ of the Employer. All new employees within the bargaining unit shall, thirty (30) days after the date of hiring, become and remain members of the Union in good standing as a condition of continuing in the employ of the Employer.

(b) Upon request made by the Employer to the Union for new help, the Union agrees to furnish said Employer with any such help that the Employer may require, within twenty-four (24) working hours. (Three days).

(c) With respect to all new help hired by the Employer, the Employer shall be entitled to a trial period of one (1)

week, during which said Employer may judge the competency of the new employees to do the work and if unsatisfactory, may discharge such new employee at will.

THIRD: A week's work shall consist of forty (40) hours spread over eight (8) hours per days on each of the first five (5) days of the week. The work day shall commence at 8:00 A.M. and shall terminate at 5:00 P.M. There shall be an interval of one (1) hour for lunch from 12:00 Noon to 1:00 P.M. Should the Union and the Employer mutually agree during the slack period to make any change in these working hours, then and in that event, the Employer shall be notified and arrangements are to be made for such change. It is mutually agreed that no work shall be performed on Saturday and Sunday.

FOURTH: All workers shall be paid for their services in accordance with the wage scale and piece work rate attached to this agreement for their respective category of work and shall be paid in cash at the end of each week.

FIFTH: It is understood and agreed that no worker shall be required to work overtime. However, in the event that it becomes absolutely necessary for overtime work to be done, all employees who perform such overtime work shall be paid at the rate of time and one-half the regular rate of pay. All work performed after 5:00 P.M. shall be deemed to be overtime work. Overtime work shall be formed only with the consent of the Union.

SIXTH: All workers shall be paid for the following legal holidays:

Lincoln's Birthday
Washington's Birthday
Decoration Day ,

Exhibit "C", Annexed to Stipulation of Facts

July 4th
Election Day
Labor Day
Thanksgiving Day
Christmas Day
New Year's Day

on which days they are not permitted to work. May 1st is to be observed as a holiday and under no circumstances shall any sort of work be performed on that day, but the employees are not to be paid for that day.

Workers shall be paid for the holiday regardless of the day on which the holiday falls.

Holiday pay for piece workers shall be computed on the following basis:

A piece worker for each of the holidays listed above, shall receive a sum equal to eight times his average straight time hourly earnings, determined by dividing the hours worked during the four weeks of work for such piece worker preceding the holiday, into the total sum earned by such employee during said period.

It is specifically understood and agreed that no employee shall be denied his full holiday pay for each of the holidays listed above, by reason of absence from active work, due to illness, layoff, or for any other bona fide reason.

SEVENTH: The Employer agrees to furnish the members of the Union a sanitary shop or shops.

EIGHTH: Tools and implements incidental to the performance of work shall be furnished to the members of the Union by the Employer free of charge.

NINTH: (a) It is agreed that all work will be performed by Union Labor in the shop or shops of the Em-

ployer. In the event that the Employer has a surplus of work on hand which he shall be unable to produce and his employees are working full time, the said Employer shall be permitted to have such surplus work performed in another Union Shop. The term "Union Shop" for the purpose of this agreement shall be defined as a shop under written agreement with Bedding, Curtain & Drapery Workers' Union, Local 140 of the United Furniture Workers of America.

(b) This article shall be effective only to the extent permissible by law.

TENTH: (a) No mattress makers or box spring makers, members of the Union, shall be required to work on box springs unless the said product has attached thereto or stamped thereon the Union Label of Bedding, Curtain & Drapery Workers' Union, Local 140 of the United Furniture Workers of America.

(b) This article shall be effective only to the extent permissible by law.

ELEVENTH: Neither the Employer, nor men in charge of deliveries, nor any officer, stockholder, director of the Firm, if the Firm is a corporation, nor a member of the Firm, if co-partnership, shall do any work in connection with mattresses, box springs, bedsprings, metal beds and bedding or any other work within the bargaining unit as defined in this agreement, except that if the Firm consists of more than one individual, only two such individuals may do work, but only within the working week as hereinabove defined, and only that type of work previously done by the individual prior to the signing of this agreement. All others are not to do any work in the branches enumerated above. All the workers employed in the shop shall be

employed directly by the firm. It is expressly understood and agreed that no employer shall perform any productive work unless the employees are present in the shop and the employees are at work. No foreman shall do any productive work unless he is a working foreman, in which event he shall be a member of the Union and subject to its rules and regulations.

TWELFTH: (a) No employees shall be discharged except for good and just cause. In no event shall an employee's employment be severed pending the processing of his grievance or the arbitration thereof.

(b) In the event of a proposed discharge, the Employer shall serve notice in writing upon the Union of the cause or reason therefor. The Union shall investigate the cause or reason for the proposed discharge. Should the Union deem the cause or reason for the proposed discharge insufficient, it shall so notify the Employer and the matter shall then be submitted to arbitration before an Arbitrator as hereinafter provided.

THIRTEENTH: In the event that any employee is required to be replaced for any reason whatsoever, by another employee, the replacement employee shall receive the same rate of pay as the employee replaced provided the replacement employee has the same skill and ability qualitatively and quantitatively as the employee replaced.

The above provision shall also apply to additional hired employees.

FOURTEENTH: The Union, may during the life of this agreement, place box spring and frame makers from its unemployed rolls to work temporary periods as box spring and frame makers in the place and stead of the regularly employed Union members, equal in competence to replaced

help. Such replacement to afford a measure of work to unemployed members, shall in no wise affect the permanent status of the regular employees. This section shall be effective only to the extent permissible by law.

FIFTEENTH: There shall be at all times in the shop, a Shop Chairman, elected by the employees at a regular meeting of the shop in the presence of a Union representative. The Shop Chairman is to act as a representative of the employees in their dealings with the Employer. There shall also be a Shop Committee of workers in the shop which shall represent the Union in its dealings with the Employer.

SIXTEENTH: (a) In the event that an employee of the Employer is suspended or expelled from membership in the Union, the Union has the right upon forty-eight (48) hours' written notice to the Employer, containing the cause or reason for such suspension or expulsion, to withdraw said suspended or expelled member from the shop and substitute another employee in his stead and place. The Union reserves the right to reinstate within two months the said suspended or expelled member to his former position upon his becoming a member in good standing of the Union.

(b) This article shall be effective only to the extent permissible by law.

SEVENTEENTH: A duly authorized representative of the Union shall have access to the shop of the Employer at all hours when the shop is open for the purpose of investigating the conditions in the shop with reference to sanitation and fire prevention, and for the purpose of ascertaining whether the conditions of this agreement are being observed. There shall be no shop meeting during the working hours nor on the premises of the Employer.

Exhibit "C", Annexed to Stipulation of Facts

EIGHTEENTH: (a) It shall not be considered a breach of this agreement if employees of the Employer refuse to perform work upon any merchandise manufactured by any manufacturer in whose factory there may be a strike or lock-out, or upon any merchandise manufactured for or on behalf of any bedding manufacturer in whose factory there may be a strike or lock-out; provided, however, that this provision shall apply only to strikes or lock-out of employees within the present jurisdiction of the United Furniture Workers of America. The union agrees to notify the Employer in writing of the existence of any such strike or lock-out. This clause shall not become effective in the event of any strike or lock-out in out-of-town factories unless the Union shall notify the Employer of the existence thereof, and until forty-eight (48) hours after said notice is mailed. It is further agreed that this paragraph shall not apply to merchandise on the premises of the Employer at the time such notice is given.

(b) This article shall be effective only to the extent permissible by law.

NINETEENTH: (a) As long as the parties to this agreement observe all the terms and conditions thereof, there shall be no strikes, stoppages, or lock-outs.

(b) In the event that any dispute should arise concerning any paragraph in this agreement, or any other matter between the Employer or employees, or between the Employer and the Union, the same shall be resolved as hereinafter provided in paragraph THIRTY-FIRST hereof, and during the pendency of such procedures provided for in paragraph THIRTY-FIRST of this agreement, both parties agree that the terms of this contract shall remain in full force and effect.

(c) It is specifically understood and agreed between the parties hereto that the procedures and forum for the

final resolution of disputes between the parties as herein set forth in paragraph THIRTY-FIRST shall be the sole and exclusive remedy available to the parties for any breaches or alleged breaches or violations or alleged violations of any of the sections or paragraphs of the within collective agreement, and the parties hereby agree that they will not resort to procedures other than those contained in paragraph THIRTY-FIRST for the resolution of any dispute between them.

TWENTIETH: (a) The Employer agrees that all work shall be equally divided among the employees of the various departments in the slack season as in periods of full employment.

(b) It is agreed that the present size of the work force in each of the shops of the Employer shall not be increased without the prior consent of the Union. In the event that the Union fails to agree the matter shall be arbitrable and shall be submitted to an Arbitrator designated by the New York State Board of Mediation, whose decision shall be final and binding upon the parties.

TWENTY-FIRST: The Union agrees to discipline any member who in any way violates the terms of this agreement.

TWENTY-SECOND: Unless a worker (weekly or hourly) is laid-off in accordance with the provisions of this agreement, such worker shall be paid for a full day's work irrespective of whether work is furnished the employee or not for the day in which such worker reports for work.

Call-in pay for piece workers shall be a minimum guarantee of fifty (50) percent of their average daily earning. In the event that piece workers are not told not to report for work after the lunch period, they shall be guaranteed an additional 50% of their average daily earnings.

Exhibit "C", Annexed to Stipulation of Facts

TWENTY-THIRD: If a general strike is called upon the order of the International Office of the Union, or of a central organization with which the Union is affiliated, such strike shall not be considered a violation of this agreement.

TWENTY-FOURTH: All workers shall receive vacation with pay in accordance with the following length of service schedule.

(a) After 3 months of employment	10 hours
(b) After 6 months of employment	20 hours
(c) After 1 year of employment	40 hours
(d) After 15 months of employment	50 hours
(e) After 18 months of employment	60 hours
(f) After 21 months of employment	70 hours
(g) After 2 years of employment	80 hours
(h) After 15 years of employment	120 hours

All workers employer for less than one (1) year, as of July 1st, 1953 and as of July 1st, 1954, shall receive a pro-rata vacation during the months of July, 1953 or July 1954.

Vacations shall be granted by the Employer during the month of July, 1953 and July 1954, and vacation pay shall be given at or prior to the vacation period.

If a paid holiday occurs during a vacation period, the worker shall be paid for such holiday in addition to his vacation pay.

Vacation pay for piece workers shall be determined as follows: A piece worker shall receive for his vacation, a sum equal to the average pay received by him for the holidays which occur from the date of the execution hereof up to the time of such vacation, multiplied by the number of days' (or fraction thereof) vacation to which such employee is entitled in accordance with the schedule hereinabove set forth.

Exhibit "C", Annexed to Stipulation of Facts

If a worker's employment is severed for any reason other than discharge for just cause, he shall receive in addition to any wages due him, pro-rated vacation pay for all of his earned and unused vacation, based upon the vacation schedule and provisions hereinabove set forth.

TWENTY-FIFTH: In the event that either a state or federal law reduces the working week to less than forty (40) hours, the wages actually received by week workers shall not be reduced by virtue of such reduction in hours, and the piece work rates shall be revised upwards so that no employee suffers a loss of money wages as the result of any legislation limiting the number of hours which the employees may work.

TWENTY-SIXTH: This agreement shall be binding upon all the parties hereto, their successors and assigns and shall be binding upon the personal representative of the Employer signatory hereto with the same force and effect as though they had originally been signatories to this agreement.

TWENTY-SEVENTH: In the event that any worker of the Employer hereafter leaves his employ as a result of being drafted into the military service of the United States in any of its branches, the Employer agrees that upon the honorable discharge of such worker from the service, and upon the application of said worker, or by the Union on his behalf, the said worker will be granted immediate reinstatement to said worker's former position or a position of like seniority, status and pay, and will be entitled to all accrued benefits and increments in pay; provided however, that such worker shall not have sustained such physical or mental disability which would prevent him from performing his duties.

Exhibit "C", Annexed to Stipulation of Facts

The worker's service in the armed forces of the United States shall be considered a leave of absence and such worker's seniority status shall consist of an accumulation of his prior service with the Company plus his length of service in the armed forces of the United States.

Provisions of any pertinent U. S. Statutes notwithstanding, application either by the worker or by the Union on his behalf, for reinstatement, as hereinabove provided, can be made at any time within six (6) months from the time of the worker's honorable discharge from the service.

Notwithstanding the limitations provided in the first paragraph of this clause, it is understood that any right previously accrued or that shall accrue to employees under prior contracts, are not thereby affected or diminished.

TWENTY-EIGHTH: The Employer agrees to deduct from the wages of each employee who has executed an appropriate dues deduction authorization, on the second pay day of each month, union dues, initiation fees, and general assessments of said employee, and to forward said deductions to the office of the Union. Prior to each deduction period, the Union will furnish the Employer with a schedule of dues owing by its employees. The Union will furnish the Employer with dues deduction authorizations from the employees.

TWENTY-NINTH: Any piece workers who are directed to do time work which is not a normal part of their regular piece work operations, shall be paid for such time on the basis of their average hourly earnings, as provided herein for holiday pay.

THIRTIETH: The minimum starting rate for general helpers shall be $1.00 per hour.

Exhibit "C", Annexed to Stipulation of Facts

(a) After 30 days of employment .. $1.15 per hour
(b) After 60 days of employment .. 1.25 per hour
(c) After 90 days of employment .. 1.35 per hour

General helpers shall not perform any production work without the consent of the Union. Should the Employer violate this provision, such general helper shall receive the prevailing rate of pay for the job.

All employees shall receive a general wage increase of ten (10¢) cents per hour retroactive to August 15, 1952.

THIRTY-FIRST: Should any dispute, difference, grievance, or controversy arise under the terms of this agreement or otherwise, between the parties hereto, the same shall be settled in the following manner:

(a) An earnest endeavor shall be made to adjust such dispute, difference, grievance or controversy between the Shop Chairman, Union representative and the Employer.

(b) If, for any reason, no mutually satisfactory adjustment of such dispute, difference, grievance or controversy shall have been reached as a result of step (a) then, and in that event, the same shall be referred to arbitration as herein set forth for determination.

(c) Any dispute, difference, grievance or controversy arising under the terms of this agreement between the parties hereto shall be submitted to an arbitrator designated by the New York State Board of Mediation, at the instance of either party hereto, for arbitration. The decision of the arbitrator shall be final and binding upon the parties.

(d) If any party to this agreement shall fail, neglect or refuse to appear in any arbitration proceeding, then in that event, it is agreed that such arbitration may nevertheless proceed to final determination upon the evidence present thereat.

Exhibit "C", Annexed to Stipulation of Facts

(e) In the event that an application for discharge of any member of the Union is made, the designated arbitrator shall hear and determine such case within five (5) working days from the date of the receipt of such application.

THIRTY-SECOND: The Employer hereby agrees, as long as this agreement remains in effect, to pay monthly on or before the tenth day of each month, a sum equal to 6% of the monthly gross payroll of the employees in the bargaining unit, to Local 140 Security Fund, for the purpose of financing a Security Plan for the benefit of the employees of the Employer within the bargaining unit. At the same time the Employer shall forward a report setting forth the figures upon which payment is based.

Commencing February 15th, 1953, the Employer agrees to pay an additional one-half (½%) percent to the Local 140 Security Fund, the sum to be applicable to the Welfare provisions of the Security Fund, making it a total of six and one-half (6½%) percent.

The employer further agrees to make the aforesaid monthly remittances to the Local 140 Security Fund at its offices and that each monthly payment shall be based upon the gross payroll of the employees in the bargaining unit for the preceding month.

It is understood that the social benefits to be provided will meet the requirements of all applicable laws and will satisfy the Employer's obligations under the New York State Disability Law, without further obligation on the part of the Employer.

It is agreed that Local 140 Security Fund will be administered in compliance with the provisions of all applicable laws.

THIRTY-THIRD: It is further understood and agreed that the Employer shall be under no obligation to see to the

application of monies paid to the Local 140 Security Fund pursuant to this paragraph for the purposes and uses above mentioned.

The Employer agrees to make available to the Union and to the Local 140 Security Fund above designated, any and all records of employees hired, classifications of employees, names, Social Security numbers, and amounts of wages paid, that the Union or the Local 140 Security Fund may require in connection with the sound and efficient operation of the Fund so designated, or that may be required by Insurance companies, if any, covering the employees, and the agreements contained in this paragraph shall be considered as of the essence of this contract.

In the event that the employer should fail to pay on or about the 10th day of each month all monies due to the Local 140 Security Fund, then in such event, the Union shall be entitled to liquidated damages in the sum of six (6%) percent of the amount due in addition thereto.

THIRTY-FOURTH: On August 15th, 1953, the Union shall have the right to reopen this agreement for the purpose of adjusting all economic issues. In such event the Employer agrees to negotiate in good faith, and any agreement arrived thereat shall be effective as of and retroactive to August 15th, 1953.

Should the parties fail or be unable to arrive at an agreement then, and in such event, the matter shall be submitted to arbitration before an arbitrator designated by the New York State Board of Mediation as hereinabove provided, and any award of the arbitrator shall be effective as of and retroactive to August 15th, 1953.

THIRTY-FIFTH: A leave of absence shall be granted any employee covered by this agreement, upon his acceptance of a full time position of office in the Union, and upon his

discontinuance of his position with the Union, or at the end of the term of office, such employee shall be entitled to reinstatement in his job with the Employer with all rights and privileges including seniority status. Upon the reinstatement of such employee, his replacement, if any, may be dismissed.

THIRTY-SIXTH: It is agreed that should the Local Union party to this agreement, disaffiliate from the United Furniture Workers of America, C.I.O., and become independent or become affiliated with a parent organization other than United Furniture Workers of America, C.I.O., then and in any such event, the terms and conditions of this agreement shall nevertheless continue in full force and effect as between the Employer and the Local Union, party hereto, whether independent or affiliated with another parent organization, with the same force and effect as if no such disaffiliation occurred and all rights accruing to the Union under this agreement and all obligations of the Union thereunder shall accrue to and devolve upon the Local Union as disaffiliated or as affiliated with a parent organization other than the United Furniture Workers of America, C.I.O., as the case may be.

THIRTY-SEVENTH: Should any of the provisions of this agreement be held or adjudged illegal or in violation of any present or future laws, such adjudication shall not invalidate any other portion or provision of the contract, nor relieve either of the parties hereto from its liabilities and obligations under, or limit the rights of either party hereto under any of the other provisions of the agreement, but the same shall continue in full force and effect.

THIRTY-EIGHT: This agreement shall become effective on the date first above written and shall remain in full

force and effect for a period of two (2) years, ending August 15th, 1954.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

BEDDING, CURTAIN & DRAPERY WORKERS' UNION, LOCAL 140 OF THE UNITED FURNITURE WORKERS OF AMERICA

By: ALEX SIROTA

Employer

By: DOUGLAS R. HENDERSON Pres.

Referee's Opinion on Objections to Claim of Local 140 Security Fund

(Record pages 43-51)

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

MEYER LINDENBAUM, Esq., Attorney for the Trustee; BOOTH, LIPTON & LIPTON, Esqs., of Counsel.

RABINOWITZ & BOUDIN, Esqs., Attorneys for the Claimant; VICTOR RABINOWITZ, Esq., of Counsel.

J. EDWARD LUMBARD, Esq., United States Attorney, Southern District of New York; ARTHUR S. ECKER, Esq., of Counsel.

PETER CAMPBELL BROWN, Esq., Corporation Counsel of the City of New York; JOHN J. LYDEN, Esq., of Counsel.

JACOB J. JAVITS, Esq., Attorney General for the State of New York; SAMUEL STERN, Esq., of Counsel.

LOEWENTHAL, *Referee*:

A motion was made by the trustee herein to expunge and disallow claim No. 38 of Local 140 Security Fund, filed herein in the sum of $2,400.00, on the ground that the bankrupt is not indebted to the said Local 140 Security Fund.

The claimant and the trustee entered into a written stipulation as to the facts, in lieu of the taking of testimony:

1. A voluntary petition in bankruptcy was filed herein on August 3, 1953, and an adjudication followed.

Referee's Opinion on Objections to Claim of Local 140 Security Fund

2. The claimant filed a claim in the sum of $2,400.00, being claim No. 38 in the office of the referee herein, alleging that the claim is entitled to a priority in payment as a wage claim, as wages earned within the three month period immediately preceding the filing of the petition herein, pursuant to Section 64 (a) (2) of the Bankruptcy Act.

3. Claimant was organized on August 1, 1950, by virtue of an Agreement and Declaration of Trust. By the terms of that Agreement, claimant was created for the purpose of financing various types of social insurance for employees in the bedding industry, including, but not limited to, life insurance, accident and health insurance, insurance for medical care and hospitalization, and disability benefit insurance.

4. Since the date of organization of claimant, various employers have entered into collective bargaining agreements with Bedding, Curtain and Drapery Workers Union, local 140, affiliated with the United Furniture Workers of America, CIO (hereinafter referred to as Local 140) by the terms of which agreements such employers have been paying sums of money to claimant, based on the gross monthly payroll of employees covered by said collective bargaining agreements, in return of which claimant has provided insurance covering such employees.

5. Insurance coverage under the aforesaid Agreement and Declaration of Trust extends to members of Local 140 only while they are working for an employer who is covered by a collective bargaining agreement between the employer and Local 140.

6. Among the types of insurance provided by Claimant under the aforesaid Agreement and Declaration of Trust is disability benefit insurance on terms at least as favorable as those required by State Law. By virtue of the afore-

said, employers who have entered into collective bargaining agreements with Local 140 that have provided for contributions to claimant, have, by virtue of that fact, received from the State of New York exemption from paying the taxes provided by the Disability Benefits Law.

7. The Local 140 Pension Fund was organized on March 13, 1952, by virtue of an Agreement and Declaration of Trust. By the terms of that agreement, the Local 140 Pension Fund was created for the purpose of financing the payment of retirement pensions for employees in the bedding industry. Since that date, claimant has been paying over to the Local 140 Pension Fund, certain portions of the moneys received from employees pursuant to the collective bargaining agreements above referred to.

8. To be eligible for pension benefits, an employee must be employed by an employer who is covered by a collective bargaining agreement with Local 140, or employers, for a specific number of years prior to the date of retirement. The amount of an employee's pension is determined by the number of years he is employed by employers covered by collective bargaining agreements with Local 140.

9. On August 15, 1952, the bankrupt entered into a collective bargaining agreement with Local 140, by the terms of which the bankrupt agreed to pay to the claimant a sum equal to 6½% of the monthly gross payroll of employees covered by said collective bargaining agreement for the purpose of providing for the insurance and pension benefits above described.

10. Beginning with that date and until the filing of the petition in bankruptcy herein, the employees of the bankrupt have enjoyed the insurance and pension benefits provided by claimant and by the Local 140 Pension Fund.

Referee's Opinion on Objections to Claim of Local 140 Security Fund

11. Under the aforesaid Agreement and Declaration of Trust, neither the employer nor the individual employee has any right, title or interest in or to any part of the trust estate or fund so created, except such rights as might accrue to an employee under an insurance policy or for other welfare benefits.

12. Under the aforesaid Agreement and Declaration of Trust and the aforesaid collective bargaining agreements, no employee has any option to receive any part of the contribution of the employer in lieu of the insurance or pension benefits provided by the trustees.

13. The employer's contribution is not subject to the payment of income and/or withholding taxes by the individual employee.

14. For some time prior to the filing of the petition herein, the bankrupt has been in default in making the payments to claimant as required under the terms of the collective bargaining agreement.

15. By the terms of the agreement, the bankrupt was not required to and never did hold such contributions or payments in trust or as trustee for the claimant.

16. The gross payroll of the bankrupt for employees covered by the agreement between the bankrupt and Local 140, for the three months prior, immediately preceding the filing of the petition herein, amounted to $15,288.53. 6½% of that sum, or $993.75, was required to have been paid by the bankrupt to claimant. No part has been paid although duly demanded.

17. Claimant claims a priority herein for wages under Section 64 (a) (2) of the Bankruptcy Act for said sum of $993.75 and the proof of claim filed as claim No. 38 is deemed amended to assert a priority claim in such amount only.

Referee's Opinion on Objections to Claim of Local 140 Security Fund

I have just stated the facts as agreed upon between the attorneys for the trustee and the claimant.

An affidavit was filed by the Corporation Counsel of the City of New York, sworn to by John J. Lyden on June 24, 1955, in which the City of New York joined in the motion disallowing and expunging the claim of Local 140 as a priority claim.

In addition to the briefs filed by the litigants to this motion, briefs were filed by the United States Attorney on behalf of the United States of America and by the Corporation Counsel, on behalf of the City of New York. Both briefs are in support of the trustee's motion to expunge the claim as to priority.

The trustee relies on *Matter of Brassel, et al.* This decision filed as recently as June 8, 1955, was decided by Chief Judge Stephen W. Brennan of the Northern District of New York. This case is also cited by the City of New York and the United States of America.

In all material respects, the Brassel case is indistinguishable from the instant case.

The agreement with the Union and the Bankrupt created a contractual obligation of debtor and creditor between the contracting parties. The Union is not one of the persons mentioned in the bankruptcy statute as a wage-earner. The employee could not sue his employer if the contribution was not made to the Union. And if he could recover he could not keep the funds as wages. The fund always remains the property of the Union. To receive any benefits from the Fund, the employee would have to remain a member in good standing of the Union for a definite period of time. When an employee leaves his job, either through the intervention of bankruptcy or voluntarily, and finds employment in some other line of endeavor, he loses all rights and benefits in the Fund

Referee's Opinion on Objections to Claim of Local 140 Security Fund

The Debtor and Creditor Law of the State of New York was amended and the term "wages" was defined to include "employer contribution to or payments of insurance or welfare benefits" (L. 1952, Ch. 794, Sec. 22). The Bankruptcy Act was not so amended.

I would like to quote from Chief Judge Brennan's opinion *Matter of Brassel,* supra:

> "If contributions to a fund by an employer are to be construed as 'wages' and as covered by the provisions of Section 64a(2) of the Act, its purpose of protection would be greatly weakened by present day conditions. A contribution of even a small percentage of the gross weekly payroll of a great number of employers would exceed the amount of $600 even in a single week.
>
> The ultimate contention here however is one of priority. Liberality of construction of the term 'wages' does not justify a nullification of the language of the statute which grants priority only to 'wages due to workmen'. The employers' contribution here is never due to the employee. He may not enforce the employers' liability therefor. The employee never had an individual or assignable proprietary interest in the contribution or to the fund of which the contribution became a part. The discretion of the trustees in the administration of the fund is final and conclusive. The contributions here may be entirely exhausted by the expense of administration or by benefits allotted to union members possessing union seniority who never have been employed by a contributing employer. Here there is no claim of an assignment by the employees. It was not the intention of the section to afford priority protection to entire strangers. The claim is not entitled to priority."

Referee's Opinion on Objections to Claim of Local 140 Security Fund

There are clearly no wages due to any working man.

There has been called to my attention my colleague Joyce's decision in *Matter of 534 Catering Corporation* where the referee allowed a priority and said "The term (wages) means compensation or reward for services rendered; * * * It includes vacations * * * and severance pay"; I agree with my brother Joyce. However, in the instant case there is never anything translatable into dollars to the individual wage-earner. The individual employee or wage-earner has no proprietary interest in the fund; nor is it in any wise assignable. Furthermore, the monthly contributions are not taxable and there is no withholding of tax at the source by the employer. This, in my judgment, takes the fund out of the "wages" category.

I, therefore, conclude that there is in existence here merely a contractual obligation between the Union and the employer (bankrupt).

The motion of the trustee is granted disallowing priority status to the claim of Local 140 Security Fund.

Dated, New York, November 1, 1955.

HERBERT LOWENTHAL,
Referee in Bankruptcy.

Petition of Local 140 Security Fund for Review

(Record pages 22-23)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

TO THE HONORABLE HERBERT LOEWENTHAL,
REFEREE IN BANKRUPTCY:

The petition of Local 140 Security Plan respectfully represents:

1. That your petitioner is a creditor of the estate of the bankrupt.

2. That on the 16th day of November 1955, an order was made by the Referee herein, and filed in this Court, a copy of which is hereto annexed marked Exhibit "A" and made a part hereof.

3. Your petitioner, being aggrieved by the said order, prays for a review thereof and complains that the Referee in making and entering said order committed error in the following particulars: that in and by said order the Referee disallowed the claim of your petitioner for a priority under the provisions 64a(2) of the Bankruptcy Act and instead directed that said claim be allowed only as a general claim although in fact the claim of the petitioner is for wages within the meaning of the aforesaid provision of the Act.

WHEREFORE, your petitioner prays that the said order be reviewed by a Judge of this Court and that the Referee

promptly prepare and transmit to the Clerk thereof his certificate thereon, together with a statement of the questions presented and a transcript of the evidence taken at the hearing, together with all exhibits therein offered.

VICTOR RABINOWITZ,
Attorney for Petitioner.

Exhibit A, Annexed to Petition of Local 140 Security Fund

(Record pages 24-25)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy No. 89554

In the Matter of

SLEEP PRODUCTS, INC.,
Bankrupt.

ORDER DISALLOWING PRIORITY CLAIM OF LOCAL 140 SECURITY FUND

At New York, in said District on the 16th day of November, 1955.

The trustee herein having moved this Court for an order disallowing the priority claim of Local 140 Security Fund and the same having come on to be heard before me,

Exhibit "A", Annexed to Petition of Local 140 Security Fund

Now, upon reading and filing the Notice of Motion, dated May 31, 1955, and the petition of William S. Hack, the trustee herein, duly verified May 27, 1955; the affidavit of John J. Lyden, duly sworn to June 24, 1955, in support thereof; and after hearing Meyer Lindenbaum, Esq., by Booth, Lipton & Lipton, Esqs. (Edgar H. Booth, Esq., of counsel) of counsel, attorney for the trustee, J. Edward Lumbard, Esq., United States Attorney for the Southern District of New York, by Arthur S. Ecker, Esq., Assistant United States Attorney, of counsel, attorney for United States of America, appearing amicus curiae, and Jacob J. Javits, Attorney General of the State of New York, by Samuel Stern, Esq., Assistant Attorney General, of counsel, attorney for State of New York, appearing amicus curiae, all in support thereof; and Rabinowitz & Boudin, Esqs., by Victor Rabinowitz, Esq., of counsel, attorneys for the claimant, in opposition thereto; and after reading and filing the Stipulation of Facts, dated September 19, 1955, entered into by and between the attorney for the trustee and the attorneys for the claimant in lieu of the taking of testimony; and after due deliberation and it appearing that the prayer of the petition is proper and that the claim of Local 140 Security Fund, as amended, is not entitled to priority in payment under Section 64a(2) of the Bankruptcy Act, it is

ORDERED, that the Stipulation of Facts, dated September 19, 1955, by and between the attorney for the trustee and the attorneys for the claimant, be and the same hereby is adopted as the Findings of Fact of this Court; and it is further

ORDERED, that the motion of the trustee be and the same hereby is granted, and the claim of Local 140 Security Fund, in the sum of $2,400.00, and thereafter amended

pursuant to the Stipulation of Facts, dated September 19, 1955, to the sum of $993.75, claim No. 38 in the office of the Referee herein, be and the same hereby is disallowed and expunged as a priority claim under Section 64a(2) of the Bankruptcy Act; and it is further

ORDERED, that the claim of Local 140 Security Fund, as amended aforesaid to the sum of $993.75, be and the same hereby is allowed as a general claim against this estate.

HERBERT LOWENTHAL,
Referee in Bankruptcy.

Opinion of Herlands, *D. J.*

(Record pages 90-112)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Appearances:

RABINOWITZ & BOUDIN,
Attorneys for Claimant-Petitioner,
Local 140 Security Plan.

PAUL W. WILLIAMS,
United States Attorney, Southern
District of New York,
Attorney for United States of America
William Stackpole, of counsel.

PETER CAMPBELL BROWN,
Corporation Counsel of the City of New York,
Attorney for The City of New York Stanley Buchsbaum, Bernard H. Sherris and John J. Lyden, of counsel.

HERLANDS, *District Judge*:

I.

The fundamental question raised on this proceeding involves the scope of the word "wages" as used in section 64 a(2) of the Bankruptcy Act (Title 11, U. S. C. A. §64a[2])[1] which grants priority to wage claims against a bankrupt. Do contributions required to be made by an employer to a union welfare fund pursuant to a collective bargaining agreement constitute "wages" within the meaning of that statutory provision, entitling a claim for such unpaid contributions to priority as a wage claim when the employer becomes bankrupt?

That question must be answered in the negative, for the reasons set forth in this opinion.

The claim involved is that of a union welfare fund known as the Local 140 Security Fund (referred to in this opinion as "the Fund"). The bankrupt-employer is Sleep Products, Inc. A collective bargaining agreement, dated August 15, 1952, had been signed by the employer and the

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[1] "§ 64—*Debts which have priority.*

(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (2) wages not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; * * *"

Bedding, Curtain and Drapery Workers' Union, Local 140, of the United Furniture Workers of America , C.I.O. (referred to in this opinion as "Local 140").

Pursuant to this agreement, the employer was required to make monthly payments computed at six percent (later six and one-half percent) of the gross monthly payroll of the employees in the bargaining unit. These payments were to be made to the Fund. For the three-month period immediately preceding the filing of the bankruptcy petition, the employer failed to pay $993.75 to the Fund; and that is the amount of the claim, as amended.

The trustee in bankruptcy moved before the referee to expunge and disallow the claim of the Fund as a priority claim for wages. The referee, by order dated November 16, 1955, granted the trustee's motion. The Fund is now appealing, seeking to review the order of the referee which disallowed priority to the Fund's claim. The United States of America and The City of New York, as tax creditors of the bankrupt employer, have appeared in support of the referee's order.

II.

In order to obtain priority status as a claim for "wages," a claim must comply with the following explicit statutory requirements:

1. It must be a claim for "wages."

2. It may not exceed $600. "to each claimant."

3. It must have been "earned" within there months before the date of the commencement of the bankruptcy proceeding.

4. It must be due to certain specified classes of employees—"workmen, servants, clerks, or traveling or city salesmen on salary or commission basis."

"Wages" for which a prior claim may be made under the statute "are closely circumscribed by express provisions of the Act," and each one of the statutory "qualifications must be satisfied before priority entails." (*Collier on Bankruptcy* [14th Ed. 1941] p. 2083.)

III.

To determine whether the claim in this case satisfies the statutory definition, it is necessary to consider its origin and nature.[2]

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[2] The pertinent portions of the collective bargaining agreement between the employer and Local 140 are the following:

"Thirty-second: The employer hereby agrees, as long as this agreement remains in effect, to pay monthly on or before the tenth day of each month, a sum equal to 6% of the monthly gross payroll of the employees in the bargaining unit, to Local 140 Security Fund, for the purpose of financing a Security Plan for the benefit of the employees of the Employer within the bargaining unit. At the same time the Employer shall forward a report setting forth the figures upon which payment is based.

"Commencing February 15th, 1953, the Employer agrees to pay an additional one-half (½%) percent to the Local 140 Security Fund, the sum to be applicable to the Welfare provisions of the Security Fund, making it a total of six and one-half (6½%) percent.

"The employer further agrees to make the aforesaid monthly remittances to the Local 140 Security Fund at its offices and that each monthly payment shall be based upon the gross payroll of the employees in the bargaining unit for the preceding month.

"It is understood that the social benefits to be provided will meet the requirements of all applicable laws and will satisfy the Employer's obligations under the New York State Disability Law, without further obligation on the part of the Employer.

"It is agreed that Local 140 Security Fund will be administered in compliance with the provisions of all applicable laws."

"Thirty-third: It is further understood and agreed that the Employer shall be under no obligation to see to the application of monies paid to the Local 140 Security Fund pursuant to this paragraph for the purposes and uses above mentioned."

The Fund was organized on August 1, 1950 under a trust agreement. By the terms of that agreement, the Fund undertook to finance various types of social insurance for employees in the bedding industry, including but not limited to life insurance, accident and health insurance, insurance for medical care and hospitalization, and disability benefit insurance.

Since the date of the Fund's organization, various employers have entered into collective bargaining agreements with Local 140. Such employers have been required to make contributions to the Fund, based on the gross monthly payroll of employees covered by said collective bargaining agreements.

On March 13, 1952, another fund, known as the Local 140 Pension Fund, was organized. This pension fund was created for the purpose of financing the payment of retirement pensions for employees in the bedding industry. The claimant-Fund has been paying over to the pension fund certain portions of the moneys received from employers.

To be eligible for pension benefits, an employee must be employed by an employer who is covered by a collective bargaining agreement with Local 140, for a specified number of years prior to the date of retirement.

Under the express terms of the trust agreements setting up the claimant-Fund and the pension fund, "neither the employer nor the individual employee have [sic] any right, title or interest in or to any part of the trust estate or fund so created, except such rights as might accrue to an employee under an insurance policy or for other welfare benefits" (Stipulation of Facts, "11").

By virtue of the disability benefit insurance terms of the claimant's trust agreement, employers who have entered into collective bargaining agreements with Local 140, providing for contributions to the Fund, have received exemption from the State of New York from paying the taxes

provided by the Disability Benefits Law (Workmen's Compensation Law, Article 9).

Under the express terms of the trust agreements setting up the claimant-Fund and the pension fund, "no employee has an option to receive any part of the contribution of the employer in lieu of the insurance or pension benefits provided by the trustees" (Stipulation of Facts, "12").

No employee has the right to receive a cash consideration in lieu of the stipulated benefits, either upon the termination of the Fund or his withdrawal, through severance of employment or otherwise (Declaration of Trust, August 1, 1950, paragraph "4"; Declaration of Trust, March 13, 1952, paragraph "4").

"The employer's contribution to the claimant is not subject to the payment of income and/or withholding taxes by the individual employee" (Stipulation of Facts, "13").

The collective bargaining agreement with Local 140 provides (paragraph "Thirty-Third") that "the Employer shall be under no obligation to see to the application of monies paid to the Local 140 Security Fund pursuant to this paragraph for the purposes and uses above mentioned." This paragraph also provides that, if the employer should fail to pay the moneys due to the Fund "the *Union* shall be entitled to liquidated damages in the sum of six (6%) per cent of the amount due in addition thereto." (Emphasis supplied.)

The tax treatment accorded the employer's contributions to the Fund indicates persuasively that such contributions are not to be treated as "wages" received by the employees. Individual employees are expressly exempted from paying an income tax on "contributions by the employer to accident or health plans for compensation (through insurance or otherwise) to his employees for personal injuries or sickness." Int. Rev. Code (1954) § 106;

C. C. H. Income Tax (1956) vol. 1, paragraph 1050," "Contributions By Employer To Accident And Health Plans."

The employer is not required to withhold at the source any portion of such contribution to the Fund. C.B.-1-1945, p. 90, I.T. 3738.

Nor can the employer's payments be construed as taxable to the employee on constructive receipt grounds. Income Tax Regulations, Reg. 18, § 39.42-2. Cf. *Sloane* v. *Commissioner of Int. Revenue*, 188 F. 2d 254, 261-2 (C. A. 6 1951).

Moreover, the employer's contribution to the Fund is not deemed part of the employee's base pay for the purpose of computing social security taxes. Federal Insurance Contributions Act (26 U. S. C. A. § 3101, et seq.), section 3121 a(2) provides:

> "(a) Wages.—For purposes of this chapter, the term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—
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> • • •
>
> (2) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of—
>
> (A) retirement, or
>
> (B) sickness or accident disability, or

(C) medical or hospitalization expenses in connection with sickness or accident disability, or

(D) death;

* * *"

A realistic analysis of the benefits receivable by the employees from the Fund and their relationship to the Fund demonstrates that the employer's contributions to the Fund do not constitute "wages" that are "earned" by and "due to" the employees. The benefits to be derived from the Fund by any individual employee are contingent and deferred. As between the employer and his employees, such benefits are indirect. Since the employer's contribution to the Fund is computed and deducted on a percentage basis with respect to the gross payroll, it cannot be said that the indebtedness of the employer for such contributions is "due to" or "earned" by any particular employee as a claimant.

The employer's contribution is due to the Fund pursuant to a contract. There is a relationship of debtor and creditor between the employer and the Fund. The obligation of such payment is not a debt to the individual employee; it is a debt to the Fund as a separate entity. The employee could not sue the employer if he failed to make payments to the Fund.

Furthermore, an employee has no proprietary or assignable interest in the Fund. If the employee has no property interest in the Fund and cannot sue to collect the contributions due from the employer to the Fund, it would be illogical and unrealistic to hold that the contributions due from the employer to the Fund can be deemed "due to" that employee.

The receipt of benefits by a particular employee from the Fund is contingent upon so many terms and conditions to be met by the individual union member that there can

be no certainty that an employer's contributions to the Fund will ever be received by any one or more of his employees. It cannot be stated with even a fair degree of assurance that any of the employees of the employer will become entitled to any benefits under the Fund within a period representing three months prior to the date of the bankruptcy proceedings.

The indefinite, contingent and prospective receipt of benefits by the employees from the Fund, does not come within the principle of "wages" embodied in the Bankruptcy Act, the prime purpose of which was to enable marginal workers to obtain promptly the wages upon which their subsistence depended. That element of immediacy and urgency is the very antithesis of postponed insurance benefits.

In the light of the foregoing, it appears clearly that the unpaid contributions of the bankrupt-employer to the Fund do not qualify as a "wage" claim. This conclusion is fortified by a consideration of the legislative purpose of the statutory provision.

IV.

The legislative intent underlying the priority given to certain types of wage claims is to furnish workers in the lower economic echelons with a protective cushion against the shock of their employers' bankruptcy. It has been reasoned [3] (1) that subordinate workingmen and menial servants depend for their subsistence upon their uninterrupted daily or weekly earnings; (2) that they have inadequate reserves to fall back upon when they are discharged

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[3] Collier on Bankruptcy (14th ed.) vol. 3, par. 64.201; In re Paradise Catering Corporation, 36 F. Supp. 974 (S. D. N. Y., 1941); Blessing v. Blanchard, 223 Fed. 35 (C. C. A. 9, 1915); Matter of Estey, 6 F. Supp. 570 (S. D. N. Y., 1934); Matter of Lawsam Electric Co., Inc., 300 Fed. 736 (S. D. N. Y., 1924).

by their employers' business failure and while they are seeking new employment; and (3) that their original choice of employment was relatively limited in scope and, therefore it would be unrealistic and unfair to make them bear the full credit risk of their employers' bankruptcy.

Do these considerations of public policy and legislative purpose encompass an employer's unpaid contribution to a union welfare fund? I think not.

V.

The word "wages" as used in section 64a(2) should be interpreted in its lay and colloquial meaning. It is used in the statute in a non-technical, popular sense.[4] It is not "a term of art," nor does it have "a meaning of art."[5] For its interpretation and application, it does not depend upon administrative expertise. There is nothing in its statutory genesis to suggest that it was coined in the context of a specific economic problem or a special area of industrial regulation.[6]

We have been taught by Justice Holmes and Judge Learned Hand that a word is only "the skin of a living

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[4] See In re Ko-Ed Tavern, Inc., 129 F. 2d 806, 809 (C. C. A. 3, 1942); In re Estey, 6 F. Supp. 570, 571 (S. D. N. Y., 1934). Cf. National Labor Relations Board v. Coca-Cola Bottling Co. of Louisville, Inc. — U. S. — (decided February 27, 1956); United States v. Ryan, — U. S. — (decided February 27, 1956).

[5] Cf. Trans World Airlines v. City and County of San Francisco, 228 F. 2d 473, 475 (C. A. 9, 1956); Commissioner of Internal Rev. v. S. Frieder & Sons Co., 228 F. 2d 478, 480 (C. A. 3, 1955).

[6] "* * * we hold that the Act is to be interpreted against its own background, * * *."—Learned Hand, Circuit Judge, in Loewi and Loewi v. Ryan, etc. (C. A. 2, decided January 25, 1956).

thought"[7] and that we must not make "a fortress out of the dictionary."[8] Justice Frankfurter has recently warned against making "of law too thin a dialectic enterprise."[9]

In that spirit, the courts have held that vacation pay, back pay and severance pay constitute "wages" within the coverage of section 64a(2).[10]

On the other hand, an employer's unpaid contribution to a union welfare fund has been held squarely to fall outside the priority "wage" claim provision of section 64a(2)[11]

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[7] Towne v. Eisner, 245 U. S. 418 (1918).

[8] Cabell v. Markham, 148 F. 2d 737, 739 (C. C. A. 2, 1945), quoted by Judge Frank in United States v. Lennox Metal Manufacturing Co., 225 F. 2d 302, 311 (C. A. 2, 1955) and in Morgan v. United States, — F. 2d —, — (C. A. 2, 1956).

[9] National Labor Relations Board v. Coca-Cola Bottling Co. of Louisville, Inc. — U. S. —, — (1956).

[10] Matter of Wil-low Cafeterias, 111 F. 2d 429, 432 (C. C. A. 2, 1940); Matter of Public Ledger, Inc., 161 F. 2d 762 (C. C. A. 3, 1947); McCloskey v. Division of Labor, etc., 200 F. 2d 402 (C. A. 9, 1952); In re Men's Clothing Code Authority, 71 F. Supp. 469 (S. D. N. Y., 1937). Cf. N. L. R. B. v. Killoren, 122 F. 2d 609 (C. C. A. 8, 1941), cert. denied 314 U. S. 696 (1941).

[11] Matter of Walter E. Brassel, et al. (N. D. N. Y., decided June 8, 1955, not officially reported), in which Brennan, Ch. J. said, in part:

> "If contributions to a fund by an employer are to be construed as 'wages' and as covered by the provisions of Section 64a(2) of the Act, its purpose of protection would be greatly weakened by present day conditions. A contribution of even a small percentage of the gross weekly payroll of a great number of employers would exceed the amount of $600 even in a single week.
>
> The ultimate contention here however is one of priority. Liberality of construction of the term 'wages' does not justify a nullification of the language of the statute which grants priority only to 'wages due to workmen.' The employers' contribution here is never due to the employee. He may not enforce the

and an analogous provision of the New York Debtor and Creditor Law.[12]

VI.

In reaching this conclusion, I have been mindful that the statute evinces a carefully drawn and delicately bal-

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employers' liability therefor. The employee never had an individual or assignable proprietary interest in the contribution or to the fund of which the contribution became a part. The discretion of the trustee in the administration of the fund is final and conclusive. The contributions here may be entirely exhausted by the expense of administration or by benefits allotted to union members possessing union seniority who never have been employed by a contributing employer. Here there is no claim of an assignment by the employees. It was not the intention of the section to afford priority protection to entire strangers. The claim is not entitled to priority."

See McKee v. Paradise, 299 U. S. 119, 123 (1936); Lane v. Industrial Com'r, 54 F. 2d 338, 340, 341 (C. C. A. 2, 1931); Samuels v. Quartin, 108 F. 2d 789, 791 (C. C. A. 2,1939).

Cf. In re Flick, 105 Fed. 503 (S. D. Ohio, 1900).

Contra: Westbury Stylists, Inc., Bankrupt, Case No. 23058 (E. D. Penn., decided May 16, 1950; not officially reported) per Referee Bachman, relying mainly on labor relations cases: Matter of 534 Catering Corporation (S. D. N. Y., decided September 31, 1949; not officially reported) per Referee Joyce; In re Schmidt (S. D. Calif., decided December 2, 1953; not officially reported) per Referee Hunt, 24 C. C. H. Labor Cases 85,004, paragraph 68,012.

[12] Matter of Well Bilt Box Spring Corp. (Bayer), 196 Misc. 848 (Sup. Ct., Kings Co., 1949); Matter of Hollywood Commissary (Weintraub), 195 Misc. 441 (Sup. Ct., Kings Co., 1949).

Contra: In re Seaboard Furniture Manufacturing Corp. (Frey), N. Y. L. J. July 22, 1948, p. 127 (Sup. Ct., Bx Co.).

Cf. Matter of Grigsby-Grunow, Inc., 80 F. 2d 478 (C. C. A. 7, 1935); Matter of Brooklyn Citizen, 1 Misc. 2d 162, 165 (Sup. Ct. Kings Co.); Ciarla v. Solvay Process Co., 184 App. Div. 629 (3rd Dept., 1918); aff'd 226 N. Y. 566; Sloat v. Rochester Taxicab Co., 177 App. Div. 57 (3rd Dept., 1917) aff'd 221 N. Y. 491; Bryant v. Pullman Co., 188 App. Div. 311 (3rd Dept., 1919) aff'd 228 N. Y. 579.

anced pattern of priorities. This statutory distribution of credit risks in a set order of priorities reflects a legislative evaluation of competing economic and social interests. To grant priority status to the claim in this case would redesign the statutory pattern. There are no compelling circumstances to warrant that result.

VII.

A statute granting priorities must be strictly construed.[13] The burden of establishing a right to preferential treatment under the statute as drawn rests upon the claimant. The claimant at bar has failed to sustain that burden. All that the claimant has done is to indicate that there is room for rational debate before Congress for an amendment of section 64a(2).

Any basic change in the pattern of priorities should be accomplished by Congress and not by the courts. In the area of bankruptcy law, we are dealing with subject-matter the essential character of which is statutory in genesis and evolution.

Moreover, changes in section 64a(2) have, in the past, been accomplished by Congressional amendment.[14]

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[13] When a wage priority is claimed under section 64a(2) of the Bankruptcy Act, "a strict construction must be placed thereon and the burden falls upon those asserting a priority to establish that they come within the intended class." Matter of Paradise Catering Corporation, 36 F. Supp. 974, 975 (S. D. N. Y. 1941).

See In re Estey, 6 F. Supp. 570 (S. D. N. Y., 1934).

Cf. Guerin v. Weil, Gotschal & Manges, 205 F. 2d 302, 304 (C. A. 2, 1953).

[14] The present language of the Bankruptcy Act provision bespeaks a slow and cautious evolution. Over the years, changes in this provision have been few and minor in character: to include salesmen; to enlarge the amount of the preferred claim from $300. to $600.; and occasional shifts in the position of relative priority. These results have been accomplished by legislation. This is not the case of statutory "language from which one can get out as much as he cares to put in it" (Circuit Judge Goodrich in Reed v. Pennsylvania Railroad Company, 227 F. 2d 810, 811 [C. A. 3, 1955]).

In the field of analogous state legislation, the term "wages" has been expanded by certain legislatures to include an employer's contribution to a union welfare fund.[15] Yet, even after such broadening of definition, the courts have confined that re-definition precisely within the four corners of the amendment, declining to adopt a view that the particular change reflected a fundamentally new concept of "wages" for all purposes.[16]

IX.

If the definition of wage claims within section 64a(2) is to be expanded, that result should be achieved by the method of Congressional amendment. That technique of law revision would afford the opportunity for full debate by labor unions, credit associations, bankruptcy law experts and others. It would permit Congress to adjust,

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[15] Laws of New York, 1952, chap. 794 (effective April 17, 1952) amending section 22 of the Debtor and Creditor Law to include within the definition of "wages or salaries," the following, *inter alia*: "employer contributions to or payments of insurance or welfare benefits; and "employer contributions to pension and annuity funds."

In California, the Legislature has imposed criminal sanctions for making the employer pay the contributions to a union welfare fund by providing that wilful failure to do so is a misdemeanor. Deering's Labor Code (Calif.) Ann. [Statutes of 1955, ch. 1570] adding section 227 to the Labor Code, relating to payments by employers into employee benefit funds. This amendment provides:

> "227. Whenever an employer has agreed with any employee to make payments to a health or welfare fund or other such plan for the benefit of the employees, or has entered into a collective bargaining agreement providing for such payments, it shall be unlawful for such an employer wilfully or with intent to defraud to fail to make the payments required by the terms of any such agreement. A violation of any provision of this section is a misdemeanor."

[16] People v. Vetri, 309 N. Y. 401 (1955), reversing 285 App. Div. 1089 (2nd Dept., 1955).

deliberately, competing economic interests and conflicting social and public policies. It would avoid uncertainty in a relatively new and expanding field of management-labor relations, where there is no standardization in the form and character of union welfare funds [17] and where there is an absence of state regulation.[18] It would enable Congress to explore the impact of the suggested new definition upon the administration of such other statutes as the Taft-Hartley Act.[19]

Accordingly, the petition of the claimant is denied and the Referee's order is affirmed. Settle order on notice.

Dated: New York, N. Y.
March 14, 1956.

WILLIAM B. HERLANDS,
U. S. D. J.

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[17] There are literally hundreds of varying forms of union welfare, pension and retirement funds. Dearing, *Industrial Pensions*, The Brookings Institution (1954); U. S. Dept. of Labor, *Collective Bargaining Provisions, Health Insurance and Pensions* (Bulletin #908-17); Rowe, *Health Insurance and Pension Plans in Union Contracts*, (U. S. Dept. of Labor, Bureau of Labor Statistics, 1955, Bulletin #1187); Brower, *Pension Plans and Their Administration* (National Industrial Conference Board, Inc., 1955); State of New York, Dept. of Labor, Division of Research and Statistics, *Collectively Bargained Pension Plans in New York State* (State of New York Pub., Bulletin #40, June 1950).

[18] See The Mitchell-Hollinger bill (S. Int. No. 3296; A. Int. No. 3796) and the Mahoney-Dannegan bill (S. Int. No. 3061; A. Int. No. 3087) introduced in the 1956 Session of the New York State Legislature. These bills seek to regulate union welfare funds.

[19] Labor Management Relations Act of 1947 (61 Stat. 136) § 302(c)(5). Cf. United States v. Ryan — U. S. —, — (1956), where Mr. Justice Clark refers to "the welfare fund problem."

Order Confirming Referee's Order Disallowing Priority Claim of Local 140 Security Fund, Appealed From

(Record pages 114-115)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

At New York, in said District, on the 6th day of April, 1956.

Local 140 Security Plan having filed a petition to review the order of the referee disallowing and expunging its claim heretofore filed herein as a priority claim under Section 64 a (2) of the Bankruptcy Act, and the same having regularly come on to be heard before me on January 19, 1956.

Now, upon reading and filing the Notice of Motion, dated May 31, 1955, and the petition of the trustee, duly verified May 27, 1955, annexed thereto, for an order disallowing and expunging the claim of Local 140 Security Fund as a priority claim; the affidavit of John J. Lyden, sworn to June 24, 1955, in support thereof; the proof of claim of Local 140 Security Fund, sworn to September 18, 1953; the order of the Referee, dated November 16, 1955, disallowing and expunging said claim as a priority claim; the petition for review of the same, dated December 14, 1955; and the certificate of the referee upon said petition to review, dated December 21, 1955, and the stipulation of facts, dated September 19, 1955 accompanying the same; and after hearing Rabinowitz & Boudin, Esqs., by Victor Rabinowitz,

Order Confirming Referee's Order Disallowing Priority Claim of Local 140 Security Fund, Appealed From

Esq., of counsel, in support of the petition for review, and Meyer Lindenbaum, Esq., attorney for trustee, by Booth, Lipton & Lipton, Esqs. (Edgar H. Booth, Esq., of counsel), of counsel, Paul W. Williams, Esq., United States Attorney for the Soutern District of New York, by William Stackpole, Esq., Assistant United States Attorney, by counsel, attorney for United States of America, appearing amicus curiae, and Peter Campbell Brown, Esq., Corporation Counsel of the City of New York, by John J. Lyden, Esq., Assistant Corporation Counsel, of counsel, attorney for the City of New York, appearing amicus curiae, all in opposition thereto; and after due deliberation and the Court having rendered its decision, dated March 14, 1956, and it appearing that the claim of Local 140 Security Fund is not entitled to priority in payment under Section 64a(2) of the Bankruptcy Act it is

ORDERED, that the petition for review be, and the same hereby is, overruled; that the order of the Referee, dated November 16, 1955, disallowing and expunging the claim of Local 140 Security Fund, as amended, as a priority claim, be, and the same hereby is, affirmed, and the said claim be, and it hereby is, disallowed and expunged as a priority claim under Section 64a(2) of the Bankruptcy Act.

WILLIAM B. HERLANDS,
U. S. D. J.

Notice of Appeal

(Record page 117)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy No. 89554

—o—

In the Matter of

SLEEP PRODUCTS, INC.,

Bankrupt.

—o—

Sirs:

PLEASE TAKE NOTICE that the Claimant-Petitioner Local 140 Security Plan hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the Court herein made and entered on the 6th day of April, 1956, and from each and every part of that order.

Dated: New York, April 19, 1956.

Yours, etc.,

RABINOWITZ & BOUDIN,
Attorneys for Claimant-Petitioner,
Office & P. O. Address,
25 Broad Street,
New York 4, N. Y.

Notice of Appeal

To:

CLERK, UNITED STATES DISTRICT COURT,
Southern District of New York,
United States Courthouse,
Foley Square,
New York 7, N. Y.

PAUL W. WILLIAMS, Esq.,
United States Attorney for
Southern District of New York,
United States Courthouse,
Foley Square,
New York 7, N. Y.

PETER CAMPBELL BROWN, Esq.,
Corporation Counsel of City of New York,
Attorney for City of New York—Amicus Curiae,
Municipal Building, New York 7, N. Y.

MEYER LINDENBAUM, Esq.,
Attorney for Trustee,
Office & P. O. Address,
185 Madison Avenue,
New York 16, N. Y.

Office - Supreme Court, U.S.
FILED
JUL 22 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 305

In the Matter
of
SLEEP PRODUCTS, INC.,
Bankrupt.

LOCAL 140 SECURITY FUND,
Petitioner,

WILLIAM S. HACK, Trustee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
Attorneys for Petitioner,
25 Broad Street,
New York 4, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1957

No.

In the Matter

of

SLEEP PRODUCTS, INC.,

Bankrupt.

LOCAL 140 SECURITY FUND,

Petitioner.

WILLIAM S. HACK, Trustee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion in the Court of Appeals is not yet officially reported. It is annexed hereto as Appendix A. The opinion in the District Court is reported at 141 F. Supp. 463 and appears in the Appendix below, copies of which are being submitted herewith, at pages 59a to 73a, inclusive. The opinion of the Referee in Bankruptcy is set forth in said Appendix at pages 49a to 55a, inclusive.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on March 4, 1957. An extension of time to August 2, 1957 for the filing of this writ was granted by a Justice of this Court on May 24, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Are employer contributions to an employee welfare plan, made pursuant to a collective bargaining agreement, entitled to a priority as "wages" pursuant to § 64a(2) of the Bankruptcy Law [11 U. S. C. 104(a)(2)]?

2. Are such employer contributions "due to workmen" within the meaning of § 64a(2) of the Bankruptcy Law?

Statute Involved

§ 64a(2) of the Bankruptcy Act reads as follows:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; * * *; (2) wages not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; (3) * * *."

Statement of the Case

This petition seeks review by this Court of an order of the Court of Appeals for the Second Circuit, affirming an order of the District Court for the Southern District of New York dated April 6, 1956 (App. 74a), confirming an order of a Referee in Bankruptcy (App. 57a) disallowing a claim filed by Local 140 Security Fund, petitioner herein, in a bankruptcy proceeding.

The jurisdiction of the Court of first instance was invoked pursuant to 28 U. S. C. §§ 1331 and 1334.

There is no dispute regarding the facts, which were stipulated before the Referee and the District Court.

On August 15, 1952, the Bankrupt entered into a collective bargaining agreement with Bedding, Curtain & Drapery Workers Union, Local 140 of the United Furniture Workers of America, CIO (hereinafter referred to as Local 140) (App. 12a). The agreement, a copy of which is annexed to the stipulation as Exhibit "C", contains the usual terms regulating the hours, wages and working conditions of the employees covered by it. It sets forth customary provisions with respect to holidays, vacations, arbitration of grievances and similar matters (App. 32a ff.).

Paragraph Thirty-second of the Agreement (App. 45a) provides that the Bankrupt was to pay to the petitioner a sum equal to 6½% of the monthly gross payroll "for the purpose of financing a Security Plan for the benefit of the employees of the Employer within the bargaining unit. * * * It is understood that the social benefits to be provided will meet the requirements of all applicable laws and will satisfy the Employer's obligations under the New York State Disability Law, without further obligation on the part of the Employer."

The record discloses that from time to time since 1950, Local 140 has entered into similar collective bargain-

ing agreements with a number of employers in the bedding industry (App. 11a).

The nature of the petitioner is described in the Stipulation of Facts. Petitioner was organized on August 1, 1950 by virtue of an Agreement and Declaration of Trust, a copy of which is annexed to the Stipulation as Exhibit "A" (App. 15a), for the purpose of financing various types of social insurance including life insurance, accident and health insurance, insurance for medical care and hospitalization, and disability benefit insurance (App. 11a).

Subsequently, and on March 13, 1952, a second Trust Fund, the Local 140 Pension Fund, was created for the purpose of financing payment of retirement pensions. Since that date petitioner has been paying over to the Pension Fund a portion of the sums received by it (App. 12a).

Although the agreement provides for monthly payments by the Bankrupt to the petitioner, in fact the Bankrupt was delinquent in payment. For the three month period immediately preceding the filing of the petition in bankruptcy, the gross payroll amounted to $15,288.53. Of this sum, 6½% or $993.75 was required to have been paid by the Bankrupt to the petitioner for the purposes aforesaid. This money was in fact not paid. Petitioner filed a timely claim with the Referee claiming a priority on the ground that the payments constituted wages due to workmen within the meaning of the Bankruptcy Act (App. 13a, 14a).

By virtue of the contract between Local 140 and other employers, including the Bankrupt as aforesaid, insurance benefits have been provided for members of Local 140 for life insurance, accident and health insurance, medical care insurance, hospitalization, disability benefits and, since 1952, pensions. The employees of the Bankrupt have enjoyed the insurance and pension benefits above referred to until the filing of the voluntary petition herein (App. 13a).

Neither the Bankrupt nor any of the individual employees has any right, title or interest in the trust-fund, except the right to insurance coverage and welfare benefits. No employee has an option to receive any part of the employer's contribution in lieu of insurance benefits. The employer's contribution to petitioner is not subject to the payment of income and/or withholding taxes by the employees (App. 13a).

On these facts, the Referee disallowed the claim of priority (App. 57a), and the District Court (App. 74a) and the Court of Appeals (Appendix A hereto) affirmed. This petition followed.

Reasons for Allowing the Writ

I.

This case presents an important question affecting the administration of the Bankruptcy Act, which grows more pressing every year. Insurance and pension funds paid for by employers have become a most important part of current collective bargaining. As of about three years ago, more than eleven million workers (excluding government and railroad employees) were covered by welfare and/or pension plans by virtue of union contract. This is more than twenty times greater than the number so covered a decade ago. See Rowe "Health Insurance and Pension Plans in Union Contracts", Monthly Labor Review, September, 1955, p. 993.

Most union contracts providing for the establishment of insurance and pension plans call for such plans to be supported exclusively by employer contributions. In 1954, 62.1% of the workers participating in insurance plans were covered by plans so financed. In the pension field, this proportion was even greater. 84.7% of all employees covered by pension plans enjoy such coverage exclusively

at the expense of their employers. See Rowe, *supra*, p. 993.

As will appear below, prior to 1955 several Referees in Bankruptcy had considered the question as to whether failure of the employer to make such contributions pursuant to agreement constituted a "wage claim," entitled to priority under the Bankruptcy Act. So far as we know, all of them held that such claims were entitled to priority.

With the increased number of workers covered by such plans and the increase in the number of bankruptcies in the past few years,[1] a substantial number of cases presenting this issue have been brought in the Bankruptcy Courts in the recent past. Aside from the instant case, two District Court decisions since 1955 have reached opposite results. The number of inquiries received by counsel for the petitioner, following upon the decision of the Court of Appeals in this case, indicates that there must be a score or more of such matters pending before Referees at the present time, some of which are being held up pending the disposition of this petition.

II.

Opinions by Referees in Bankruptcy are not customarily reported. The first decision on the subject we have been able to find was that of Referee Joyce in *Matter of 534 Catering Corp.*, No. 84856, Southern District of New York, September 21, 1949. His opinion reads in full as follows:

> "The question presented is whether the required contributions accruing within three months before the date of Bankruptcy, November 26, 1946, are wages within the meaning of Section 64a(2) of the Bankruptcy Act (11 U. S. C. 104). The term means

[1] In the fiscal year 1949-50, 33,392 bankruptcy cases were commenced in the federal courts. By the year 1955-56, this had increased to 62,086. Annual Report of the Director of the Administrative Office of the United States Courts, 1950 (p. 188) and 1956 (p. 270).

compensation or reward for services rendered; In re New England Thread Co., 158 Fed. 788, 792; In re Thomas Deutschle & Co., 182 Fed. 430, 431. It includes vacations; In re Wil-low Cafeterias, Inc., 111 F. (2d) 429; and severance pay; In re Public Ledger, 161 F. (2d) 762.

"The trustee urges that the present case differs because no part of the contribution is payable to or demandable by the employee, although he is entitled to receive the benefits which the funds are designed to provide. The fact remains, nevertheless, that the services of the employee constitute the entire consideration for the employer's payments to the fund. The form or character of the consideration given or promised by the employer is unimportant so long as it represents compensation for the services of the employee. Priority is allowed to the first named claimant in the sum of $146.40 and to the other in the amount of $68.25."

We know of six other cases deciding the same issue between 1949 and 1955: *Matter of Berkey & Gay Furniture Co.* (D. C. W. D. Mich., Bankruptcy No. 10008); *Matter of Ehrlich & Meyers* (D. C. E. D. Pa., Bankruptcy No. 23003); *Matter of Westbury Stylists, Inc.* (D. C. E. D. Pa., Bankruptcy No. 23058); *In re Schmidt* (D. C. S. D. Calif., Bankruptcy No. 55,561-T); *In re Scheibler* (D. C. S. D. Calif., Bankruptcy No. 55,560-T), and *Matter of Fidelity Tube Corp.* (D. C. N. J., Bankruptcy No. 504-53). None of these cases has been officially reported; the *Schmidt* and *Scheibler* cases are unofficially reported at 33 LRRM 2283.

In every one of these cases, the referee decided that such employer contributions were entitled to priority.

The first holding to the contrary was in *Matter of Brassel*, 135 F. Supp. 827 (D. C. N. D. N. Y., 1955). This decision was followed by the District Court decision in the instant case. Pending the appeal to the Court of Appeals herein, the District Court for the Southern District of California, in *In re Otto*, 146 F. Supp. 786, held that the claims were entitled to a priority, refusing to follow either the *Brassel* case or the instant decision.

III.

Our industrial society has been a dynamic one and it is not surprising that both the amount and form of wages paid to wage earners should have undergone constant change in the last century. In recent times a whole series of "fringe" benefits, all part of the payment for work performed, have become part of the wage contract. Included in such fringe benefits are Christmas or annual bonuses, attendance rewards, paid vacations, paid holidays, sick leave, severance pay, cost of living increments, reimbursement for jury service, profit-sharing, pensions, guaranteed annual wage, and a wide variety of insurance payments. Both employers and employees have always regarded such benefits as part of the compensation for labor performed. To the employer they represent a cost of employment just as real as an hourly rate; to the employee they represent a form of compensation just as real as the weekly paycheck.

The Bankruptcy Law in the past has proved itself sufficiently flexible to provide the protection which, as a matter of policy, Congress has determined should be afforded to the wage earner. When, at the turn of the century, incentive and piece work payments became a prominent feature of industrial society, it was held that such payments were "wages" within the meaning of the Act. *In re Gurewitz*, 121 F. 982 (C. C. A. 2, 1903). See also *In re New England Thread Co.*, 158 F. 788 (C. C. A. 1, 1907).

The inclusion of vacation pay within the term "wages" as used in the Bankruptcy Act became an important issue in the 1940s [2] when a series of decisions held, without significant exception, that vacation pay was included. *In re Wil-low Cafeterias, Inc.*, 111 F. 2d 429 (C. C. A. 2, 1940); *In re Public Ledger*, 161 F. 2d 762 (C. C. A. 3, 1947); *Divi-*

[2] Actually the first case on the subject seems to have been *In re B. H. Gladding Co.*, 248 F. 605 (D. C. R. I., 1903), but the issue does not seem to have arisen again until about 1940.

sion of Labor Law Enforcement, State of Calif. v. *Sampsell*, 172 F. 2d 400 (C. A. 9, 1949); *In re Kinney Aluminum Co.*, 78 F. Supp. 565 (S. D. Calif., C. D., 1948); *In re Red, White & Blue Litho. Inc.* (C. C. H. Bankruptcy Decisions, ¶ 58, 151; D. C. S. D. N. Y., 1954).

Severance pay was the next fringe benefit brought to the attention of the courts. There, too, it was held uniformly that such payments came within the definition of wages. *In re Public Ledger, supra; In re Elliott Wholesale Grocery Co.*, 98 F. Supp. 1017 (S. D. Calif., 1951), affirmed *sub nom McCloskey* v. *Division of Labor Law Enforcement*, 200 F. 2d 402 (C. A. 9, 1952).

Back pay awards under the National Labor Relations Act were also construed as wages which had been "constructively earned" and therefore entitled to priority. *NLRB* v. *Killoren*, 122 F. 2d 609 (C. C. A. 8, 1941), cert. den. 314 U. S. 696 (1941).

We have already noted that Referees in Bankruptcy have extended the protection of § 64a(2) to employer contributions to security funds, beginning with Referee Joyce's decision in 1949.

Of course, the Bankruptcy Act is not the only statute in which the word "wages" is used and the courts in interpreting the National Labor Relations Act have come to the same conclusion. The leading case on the subject is *Inland Steel Co.* v. *NLRB*, 170 F. 2d 247, 251 (C. A. 7, 1948), cert. den. 336 U. S. 960 (1949). There the Court said:

> "* * * we are convinced and find that the term 'wages' as used in Section 9(a) must be construed to include emoluments of value, like pension and insurance benefits, which may accrue to employees out of their employment relationship. * * * Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure * * *."

See also *Cross & Co.* v. *NLRB*, 174 F. 2d 875 (C. A. 1, 1949); *NLRB* v. *Stackpole Carbon Co.*, 128 F. 2d 188 (C. C. A. 3, 1942); *Black Clawson Co.*, 103 NLRB 928 (1953); *NLRB* v. *Bemis Bros. Bag Co.*, 206 F. 2d 33 (C. A. 5, 1953).

IV.

This Court passed upon a closely related issue at its last term. In *U. S.* v. *Carter*, No. 48, October Term, 1956, 77 Sup. Ct. 793, the question was presented as to whether employer contributions similar to those in the instant case were guaranteed by a contractor's payment bond "for the protection of all persons supplying labor" on a Federal public building project. [Miller Act, 40 U. S. C. Sec. 270a(1).] It would appear from the opinion of this Court that the collective bargaining contract and the welfare fund involved in that case were identical with the agreement and the welfare fund in the instant case, except (1) the contract in the *Carter* case specifically stated that employer contributions were not to be considered as "wages", while no such stipulation appears in the instant case; (2) in *Carter*, employer contributions were calculated on the basis of hours worked; here contributions are based on wages earned.

This Court held that the Miller Act was intended to provide "a broad but not unlimited protection" for persons supplying labor for public buildings and that payment of employer contributions to a welfare plan was "a part of the compensation for the work to be done" by the employees (77 Sup. Ct. 797).

In the *Carter* case, as in the instant case, a second issue was raised, namely, whether the welfare fund was a proper claimant. The lower courts in the *Carter* case, as the Court of Appeals here, held that the welfare plan was not a proper claimant, because it was not an employee. This Court held in *Carter* that the trustees of the welfare fund

"stand in the shoes of the employees and are entitled to enforce their rights" (at p. 798). So the petitioner here stands in the shoes of the employees of the bankrupt. Cf. *Shropshire Woodliff & Co.* v. *Bush*, 204 U. S. 186.

V.

The opinions below argue that the term "wages" did not encompass the amount of payments here under consideration. For the reasons set forth above, we believe the courts to have been in error. The courts have always interpreted the Bankruptcy Act liberally with a view to effectuating its purpose, and its purpose is to protect, as fully as possible, a priority to compensation due to employees. *In re Lawsam Electric Co. Inc.*, 300 F. 736 (D. C. S. D. N. Y., 1924); *Blessing* v. *Blanchard*, 223 F. 35 (C. C. A. 9, 1915); *Guaranty Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U. S. 152, 160 (1912); *Manly* v. *Hood*, 37 F. 2d 212, 214 (C. C. A. 4, 1930). Cf. *United States* v. *Carter*, *supra*.

The additional contention was made by the Court of Appeals here, that the claimant is not a workman to whom wages are due and hence is not entitled to a priority. This point was not raised by the Trustee in Bankruptcy nor by any of the persons objecting to allowance of the claim, nor was it considered by the Referee or the District Court. The issue seems to have been disposed of by the *Carter* case, *supra*. Cf. *Nathanson* v. *NLRB*, 344 U. S. 25; *NLRB* v. *Killoren*, 122 F. 2d 609.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Dated: July 11, 1957.

Respectfully submitted,

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
Attorneys for Petitioner,
25 Broad Street,
New York 4, N. Y.

Appendix A

(Opinion of the United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 77—October Term, 1956

(Argued January 14, 1957 Decided March 4, 1957)

Docket No. 24113

LOCAL 140 SECURITY FUND,

Claimant-Appellant,

against

WILLIAM S. HACK, Trustee in Bankruptcy of SLEEP PRODUCTS, INC.,

Respondent-Appellee.

Before:

MEDINA and HINCKS, *Circuit Judges*, and LEIBELL, *District Judge*.

Appeal by Local 140 Security Fund from an order of the District Court for the Southern District of New York (Herlands, J.) confirming an order of a Referee in Bankruptcy which disallowed the claim of the appellant herein as a priority claim under Sec. 64(a)(2) of the Bankruptcy Act. Affirmed.

RABINOWITZ & BOUDIN, New York City, for Claimant-Appellant.

MEYER LINDENBAUM, New York City (Booth, Lipton & Lipton, New York City; Edgar A. Booth and Leonard A. Sheft, of Counsel), for Respondent-Appellee.

PETER CAMPBELL BROWN, Corporation Counsel, New York City (Stanley Buchsbaum, Bernard H. Sherris and John J. Lyden, of Counsel), for Claimant, City of New York.

PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, New York City (William Stackpole, of Counsel), Amicus Curiae.

LEIBELL, *District Judge*:

In the above entitled bankruptcy proceeding Local 140 Security Fund filed a claim for $2,400.00. It further asserted that the claim was entitled to priority as a claim for "wages" pursuant to Section 64(a)(2) of the Bankruptcy Act.[1] A petition to expunge the Fund's claim was filed with the Referee by the trustee of the bankrupt. Prior to a hearing on the petition, a stipulation of facts was entered into and the amount of the claim was reduced to $993.75. The claimant's right to priority for the reduced amount, as a claim for "wages," was contested before the Referee. He sustained the trustee's contention that the

---

[1] § 64. DEBTS WHICH HAVE PRIORITY.

(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (2) wages not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceedings, due to workmen, servants, clerks, or travelling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; * * *. [T. 11 U. S. C. § 104(a)(2).]

claim was not a wage claim and was not entitled to priority. He allowed the claim only as a general claim.

On a petition to review the Referee's determination, the District Court sustained the Referee's ruling and entered an order accordingly. The issue is now before this Court on an appeal by the Fund from the District Court's order. The City of New York, a tax claimant, joins with the trustee in opposing the Fund's claim to priority. So does the Government, also a tax claimant.

A form of collective bargaining agreement between Local 140 and Sleep Products, Inc. (Ex. C annexed to the Stipulation of Facts) contained the usual provisions in relation to the hiring of employees, hours of employment, rates of compensation, days to be defined as legal holidays, vacation pay, and the deduction from the wages of the employee of an appropriate amount for "dues" payable to the Union.

Paragraph Thirty-second of the agreement contained provisions for payments to be made by the employer to Local 104 Security Fund and reads as follows:

> "Thirty-second: The Employer hereby agrees, as long as this agreement remains in effect, to pay monthly on or before the tenth day of each month, a sum equal to 6% of the monthly gross payroll of the employees in the bargaining unit, to Local 140 Security Fund, for the purpose of financing a Security Plan for the benefit of the employees of the Employer within the bargaining unit. At the same time the Employer shall forward a report setting forth the figures upon which payment is based.
>
> Commencing February 15th, 1953, the Employer agrees to pay an additional one-half (½%) per cent to the Local 140 Security Fund, the sum to be applicable to the Welfare provisions of the Security Fund, making it a total of six and one-half (6½%) per cent.
>
> The employer further agrees to make the aforesaid monthly remittances to the Local 140 Security

Fund at its offices and that each monthly payment shall be based upon the gross payroll of the employees in the bargaining unit for the preceding month.

It is understood that the social benefits to be provided will meet the requirements of all applicable laws and will satisfy the Employer's obligations under the New York State Disability Law, without further obligation on the part of the Employer.[2]

It is agreed that Local 140 Security Fund will be administered in compliance with the provisions of all applicable laws."

The Referee, in expunging the claim as a priority claim, based his decision on Judge Brennan's ruling in a similar case, *Matter of Brassel*, 135 F. Supp. 827 (Northern District of New York).

In the *Brassel* case Judge Brennan held that a creditor, a union welfare trust fund, making a claim against Brassel's estate based on his failure as an employer to pay to the union's welfare fund 5% of the gross payroll of all employees covered by a collective bargaining agreement, was not entitled to priority on its claim as a wage claim.

In affirming Referee Lowenthal's order in the case at bar Judge Herlands wrote a well-considered opinion (141 F. Supp. 463) and concluded that any enlargement of the term "wages" in Section 64(a)(2) of the Bankruptcy Act, so as to include payments made by an employer to a Welfare Fund under a collective bargaining agreement, should be left to Congressional action through an amendment to the Act. To support that view he cites what the New York State Legislature did in 1952, in amending Section 22 of

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[2] The New York Disability Benefits Law which is part of the Workmen's Compensation Law §§ 200 to 242, by § 211(5) thereof recognizes an agreement such as the present one, as a compliance with the employer's obligations under that statute.

the Debtor and Creditor Law to include in the definition of "wages or salaries" the contributions of employers to insurance or welfare benefits, and to pension and annuity funds. Claims of Welfare Funds for unpaid sums due from the employer are granted a preference in the administration of the estate of an employer who makes a General Assignment for the benefit of his creditors under the New York statute.

Prior to the July 1952 amendment of Section 22 of the New York Debtor and Creditor Law, judges of the State Supreme Court had rendered conflicting opinions on the right of a Welfare Fund to a preference similar to the preference given wage claims in a proceeding under a General Assignment.[3] In the Federal Court we now have conflicting opinions in the District Courts on the right of Welfare Funds to a wage claim priority against a bankrupt employer.[4]

Judge Brennan's opinion in the *Brassel* case has been the subject of commentary notes in two Law Reviews. The Georgia Bar Journal of August 1956 (Vol. XIX, Number 1) pp. 107-108, disagreed with Judge Brennan's opinion. The article stated that the opinion seemed to minimize the idea of partial benefit to the employee (who would cease to derive any benefit upon a lapse in union membership) and to disregard the connection between the payments to the fund and the work done.

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[3] See *In re Well Bilt Box Spring Corp.* (1949), 89 N. Y. S. 2d 768.

[4] The *Brassel* case in the Northern District of New York (Judge Brennan's opinion); the *In re Otto* case in the Southern District of California, 146 F. Supp. 786 (Judge Mathes' opinion); and Judge Herlands' opinion in the present case. In addition there are conflicting opinions of Referees in Bankruptcy.

The article in the Chicago-Kent Law Review, Vol. XXXIV (1955-1956) pp. 235-239 agreed with Judge Brennan's disposition of the *Brassel* case and stated:

> "The conclusion reached in the instant case, therefore, seems to be an inescapable one even under the most liberal construction of all of the terms of the relevant portions of the statute for the claimant was not a workman, or an assignee of a workman; the sum claimed did not represent wages in the ordinary sense of the term; and the amount payable, while measured by the amount of wages earned, formed no more than a contractual obligation owed to a third person. * * * If the fringe benefits now common under modern mass employment contracts are to be protected against the impact of bankruptcy, substantial revision would have to be made both in the statutory language and in the fundamental concepts concerning priorities."

Judge Herlands' opinion in the case at bar has been discussed in a rather extensive note in 66 Yale Law Journal, No. 3, pp. 449 to 461. The author states that "from the standpoint of legislative intent, however, the *Sleep* opinion may appear to be on solid ground." * * * "The courts, however, should ascribe a broader purpose to the wage priority."

To follow that suggestion would lead to as many different judicial opinions as there are different forms of collective bargaining agreements containing provisions for payments to Welfare Funds. Some contain an assignment of a portion of the workmen's wages as a payment to the Welfare Fund. *In re Ross*, 117 F. Supp. 346. There is a sound basis for a claim of priority by the assignee, the Welfare Fund, in such a case,[5] although the determination

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[5] *Shropshire, Woodliff & Co.* v. *Bush*, 204 U. S. 186; *In re Stultz*, 226 Fed. 989.

of the amount of its claim, if the employees also have filed claims for unpaid wages, may present some difficulty. Other collective bargaining agreements, such as in the case at bar, provide only for a payment by the employer to the Welfare Fund, with no assignment or deduction from the workmen's wages. An intermediate class contains a combination of payments by the workman and by the employer to the Fund.

The claim in its origin must be one for wages due to a workman, to be entitled to priority under Sec. 64(a)(2). If it is, the right of priority carries over to the workman's assignee. If the claim was never a part of his wages and was never a sum due to him, it would not be entitled to priority; and no theory of an indirect conditional benefit to him can give it priority. "The priority is attached to the debt, and not to the person of the creditor; to the claim and not to the claimant."[5]

In *Nathanson* v. *Labor Board*, 344 U. S. 26, Mr. Justice Douglas, writing the majority opinion, denied claims of the Board for back pay awards made under Section 10(c) of the National Labor Relations Act, to fifth class priority as a claim of the United States under Section 64(a)(5) of the Bankruptcy Act. The claims were genuine claims for wages but they could not meet the priority requirement of having accrued within three months of the employer's bankruptcy under Section 64(a)(2). The opinion stated (pp. 28-29):

> "The Board argues that the interest of the United States in eradicating unfair labor practices is so great that the back pay order should be given the additional sanction of priority in payment. Whether that should be done is a legislative decision. The contest now is no longer between employees and management but between various classes of creditors.

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[5] *Shropshire, Woodliff & Co.* v. *Bush*, 204 U. S. 186; *In re Stultz*, 226 Fed. 989.

> The policy of the National Labor Relations Act is fully served by recognizing the claim for back pay as one to be paid from the estate. The question whether it should be paid in preference to other creditors is a question to be answered from the Bankruptcy Act. When Congress came to claims for unpaid wages it did not grant all of them priority. It limited the priority to $600 for each claimant and even then only allowed it as respects wages earned within three months before the date of the commencement of the proceedings. § 64(a)(2). We would depart from that policy if we granted the priority to one class of wage claimants irrespective of the amount of the claim or the time of its accrual. The theme of the Bankruptcy Act is 'equality of distribution' (*Sampsell* v. *Imperial Paper Corp.*, 313 U. S. 215, 219); and if one claimant is to be preferred over others, the purpose should be clear from the statute. We can find in the Bankruptcy Act no warrant for giving these back pay awards any different treatment than other wage claims enjoy."

What were specified in the collective bargaining agreement, Exhibit C, as payments by the employer to Local 140 Security Fund under paragraphs Thirty-second and Thirty-third, created only a debtor and creditor obligation between the employer and third parties, for something other than wages. The language of the statute granting priority to wages cannot be stretched so as to embrace this type of claim. If every type of payment made by an employer to a union welfare fund is to be given priority as a claim for "wages" under Section 64(a)(2) of the Bankruptcy Act, that should be done through the legislative action of the Congress, and not by any judicial mislabeling of such payments as "wages."

The order of the District Court is *Affirmed*.

HINCKS, Circuit Judge (concurring):

I concur in all respects with Judge Leibell's opinion. I add these few words only to make it plain that in my opinion the indicated result is required not only because the debts for which the statutory priority is claimed are not "wages" but also because they are not "due to workmen, servants, clerks, etc." To me it seems self-evident that the appellant-Fund is not a *workman*. Nor have any of the "workmen" assigned their claims to the appellant. It appears to me wholly inadmissible to say that the appellant is an "equitable assignee" of "workmen" when, as the appellant truly says in its brief, no employee "has any right, title or interest in the trust fund, except the right to insurance coverage and welfare benefits"; and "No employee has an option to receive any part of the employer's contribution in lieu of insurance benefits."

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IN THE

Supreme Court of the United States

October Term, 1957

No. 305

In the Matter

of

SLEEP PRODUCTS, INC.,

Bankrupt.

LOCAL 140 SECURITY FUND,

Petitioner,

WILLIAM S. HACK, Trustee.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
Attorneys for Petitioner,
25 Broad Street,
New York 4, N. Y.

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The brief submitted by respondent in opposition to the petition for a writ of certiorari serves to make more clear the compelling reasons for granting the writ.

1. In the short period since the petition was drawn, there have been two additional District Court decisions, both referred to in respondent's brief. The first of these, *In re Embassy Restaurant, Inc.* — F. S. —, 26 U. S. Law Week 2027 (D. C., Pa., June 28, 1957), held that the claims of a security fund in circumstances such as these were entitled to priority. The second, *In re Victory Apparel Mfg. Corp.*, — F. S. —, 26 U. S. Law Week 2059 (D. C. N. J., July 17, 1957), held to the contrary.

Thus, as matters now stand, there are (aside from the instant case) four District Court decisions on the subject,

two of which have upheld a claim of priority and two of which have denied such claim. We are advised that the number of cases pending before referees throughout the country is increasing substantially.

2. Respondent concedes that *United States* v. *Carter*, 353 U. S. 210, bears "a surface similarity" to the instant case (Resp. br., p. 10). Certainly it is, in spirit, contrary to the decision of the Court of Appeals in this case. Whether the spirit of that ruling can be applied to a case arising under the Bankruptcy Act goes to the merits of petitioner's claim and can be argued fully if this petition is granted.

3. Respondent urges that there is no conflict between courts of appeals and that hence the petition should be denied. It would be unfortunate if this Court were to withhold the granting of a petition to review this issue until such conflict has developed. As appears from an examination of the cases already decided, the amount involved in each case is frequently small, as indeed is usually the case with claims arising out of small business bankruptcies. In the instant case, for example, the cost of an appeal is likely to be considerably greater than the amount which might be realized by petitioner if it is successful. Despite this, petitioner has decided to proceed with this case, in the hope that the matter can here be settled. It would be unreasonable to require other Funds similarly situated to expend trust moneys in litigation when the matter can be decided expeditiously now. There can hardly be any question that a conflict of opinion in the courts of appeals will ultimately develop, in view of the wide diversity of opinion now shown in the district courts.

The importance of uniformity in the administration of the Bankruptcy Law is well established. There is no wisdom in permitting the continuance of expensive litigation, especially as the ultimate parties in interest are the working men and women whom the Act was designed to protect.

4. Briefs in opposition have also been filed by several of the claimants. These briefs in substance repeat the argument of the respondent. Furthermore, we do not understand that claimants have the right to file briefs under the circumstances here presented. They are not parties to this action, and no reason is shown why they are not adequately represented by the trustee.

Dated: September 3, 1957.

Respectfully submitted,

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
Attorneys for Petitioner,
25 Broad Street,
New York 4, N. Y.

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PETER CAMPBELL, BROWN,
Corporation Counsel,
Attorney for Claimant
City of New York,
Municipal Building,
New York 7, N. Y.

STANLEY BUCHSBAUM,
BERNARD H. SHERRIS,
JOHN J. LYDEN,
of Counsel.

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WILLIAM S. HACK, Trustee.

BRIEF OF CLAIMANT CITY OF NEW YORK IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

The question involved is whether a claim by a union welfare fund, based upon provisions of a collective bargaining agreement requiring the employer (without making any deduction from the wages of its employees) to make monthly payments to the fund based on a fixed percentage of the gross monthly payroll of the employees in the bargaining unit, is a claim entitled to a priority as "wages" under §64a(2) of the Bankruptcy Law [11 U.S.C. 104(a)(2)].

This question must be considered in light of the fact that the employees have no option to receive any part

of the payments to the fund and have no right, title or interest in the fund except rights which accrue under an insurance policy or other welfare benefits which rights may not be assigned, and the insurance is only available so long as an employee is working for an employer covered by a collective bargaining agreement with a specified union while the other benefits apply only when an employee has worked for employers covered by such an agreement for a fixed number of years prior to retirement.

Facts

1

The petitioner, Local 140 Security Fund (hereinafter referred to as "the Fund"), was organized pursuant to an agreement and declaration of trust for the purpose of financing various types of social insurance for employees in the bedding industry (App. 11a). These include, but are not limited to, life insurance, accident and health insurance, insurance for medical care and hospitalization and disability benefit insurance (App. 11a). In addition, the Fund pays over moneys to a separate pension fund for the purpose of financing retirement pensions for employees in the bedding industry (App. 12a).

Collective bargaining agreements entered into between employers and the Bedding, Curtain and Drapery Workers Union, Local 140, provide for payments by the employer to the Fund based upon the gross monthly payroll of employees covered by the agreement (App. 11a). The bankrupt employer here involved entered into such an agreement under which it agreed to make monthly payments to the Fund of "a sum equal to 6% of the monthly gross payroll of the employees in the bargaining unit," plus a

similar additional payment of ½% (App. 45a). This agreement also provided that the social benefits provided by the Fund "will meet the requirements of all applicable laws and will satisfy the Employer's obligation under the New York State Disability Law, without further obligation on the part of the Employer." (App. 45a). As a result of this latter type of provision employers receive an exemption from paying the taxes provided by the New York Disability Benefits Law (Workmen's Compensation Law §211, pars. 4, 5) [App. 12a].

2

The payment of the employer's contribution to the Fund is not subject to the payment of income or withholding taxes by the individual employee (App. 13a). No employee has an option to receive any part of this contribution or payment by the employer in lieu of the insurance or pension benefits (App. 13a). The individual employee does not have any right, title or interest in any part of the trust estate or fund so created, except such rights as may accrue to him under an insurance policy or for other welfare benefits (App. 13a). No employee has the right to assign his insurance, pension or other benefits or to receive a cash consideration in lieu of such benefits, even upon severance of employment (App. 17a, 27a).

The insurance coverage provided by the Fund extends to an employee only while he is working for an employer who is covered by a collective bargaining agreement with Local 140 of the Union (App. 11a). To be eligible for pension benefits an employee must be employed by an employer or employers covered by a collective bargaining agreement with Local 140 "for a specified number of years prior to the date of retirement" (App. 12a).

For some time prior to the filing of the petition in bankruptcy, the bankrupt had been in default in making payments to the Fund (App. 13a). The amount which, under the collective bargaining agreement, the bankrupt was required to but did not pay to the Fund for the three-month period immediately preceding the filing of the petition was $993.75 (App. 13a-14a).

The Fund claimed a priority under Section 64a(2) of the Bankruptcy Act (App. 14a). The City of New York, which had filed a priority claim for excise taxes under Section 64a(4) of the Bankruptcy Act, joined the trustee in a motion to disallow the claim of the Fund as a priority claim (App. 8a-10a).

Referee Loewenthal disallowed and expunged the Fund's claim on a priority basis, but allowed it as a general claim (App. 57a-59a). He wrote an opinion in which he concluded that the payments to the Fund did not constitute "wages" under the Bankruptcy Act since they were not translatable into dollars to the individual wage-earner, gave him no proprietary or assignable interest and were not taxable to him as income (App. 49a-55a).

The District Court for the Southern District of New York affirmed the order of the Referee (App. 74a-75a). Judge Herlands wrote an opinion which constitutes a careful and detailed analysis of the problem. (App. 59a-73a). The Court of Appeals unanimously affirmed.

ARGUMENT

Payments by an employer to a union welfare fund which are not deducted from the wages of employees are not entitled to the wage priority provided by Bankruptcy Act §64a(2).

1

The priority provided by Section 64a(2) applies only to "wages * * * which have been earned * * *, due to workmen," etc. Here the payments required by the collective bargaining agreement to be paid to the union welfare fund are on their face not wages, not earned by the employees and not due to them.

They are not wages in the sense that they are not paid to the employee. Nor may he enforce the employer's liability for such payments. The employee does not have and never did have an assignable interest in such payments (App. 17a, 27a). In addition, the individual employee does not "have any right, title or interest in or to any part of the trust estate or fund" created from such payments except such rights as might accrue to him under an insurance policy or for other welfare benefits (App. 13a).

Even the insurance coverage is limited to the period that the employee is working for an employer who has a collective bargaining agreement with Local 140 (App. 11a). Thus, [illegible]very employees who lose their jobs because of the bankruptcy are ineligible for this insurance coverage unless and until they obtain employment with another employer who has a collective bargaining agreement with Local 140. And an employee is entitled to a pension only after he has worked for an employer covered by such a collective bargaining agreement for a specified number of years prior to the date of retirement (App. 12a).

The payments do not constitute a deduction from the wages of an employee. The employer, under the collective bargaining agreement, agreed to pay to the Fund "a sum equal to" 6½% of the monthly gross income of the employees in the bargaining unit (App. 45a). In part this payment was for the employer's own benefit since it was agreed that the social benefits to be provided by the Fund would "meet the requirements of all applicable laws and will satisfy the Employer's obligations under the New York State Disability Law, without further obligation on the part of the Employer" (App. 45a). Obviously, had the employer been required to make payments under the New York State Disability Law, such payments would not constitute wages of the employees.

The view that the payments do not constitute wages of the individual employees is confirmed by the fact that such payments are not subject to the payment of income or withholding taxes by the employees (App. 13a). Nor are they considered as wages under the Insurance Contributions Act (Social Security Law) [26 U. S. C. 1426 (a)(2)].

The payments are not earned by the individual employee since it is evident that whatever indirect benefit an employee gains from such payments—the limited rights to insurance and a pension—are retained even when he does not work because of illness during a month for which a payment to the fund becomes due.

We have already shown that the payments are not due to the individual employee in our discussion of these payments as wages.

2

In the analogous cases of *Matter of Well Bilt Box Spring Corp. (Bayer)*, 196 Misc. 848 (Sup. Ct., Kings Co., 1949) and *Matter of Hollywood Commissary (Weintraub)*,

195 Misc. 441 (Sup. Ct., Kings Co., 1949), the New York courts held that claims for union welfare funds were not entitled to a wage priority in assignments for benefit of creditors under the analogous provision of law which, at that time, read (Debtor and Creditor Law, §22):

> "In all distribution of assets under all assignments made in pursuance of this article, the wages or salaries actually owing to the employees of the assignor or assignors at the time of the execution of the assignment for services rendered within three months prior to the execution of the assignment, not exceeding three hundred dollars to each employee, shall be preferred before any other debt;"

In the *Hollywood Commissary* case the Court said (195 Misc. at p. 442):

> "This is not a claim for wages although the amount is computed by a percentage of wages. It is not deducted from the employees' wages but is merely a matter of contract between the employer and the union."

Subsequently legislation was enacted which expressly provided a priority for such payments by an employer to a welfare fund (L. 1952, ch. 794, §1). The Bankruptcy Act, however, has not been so amended. Nor can the State law be applied in construing the meaning of "wages" under the Bankruptcy Act. *Lane* v. *Industrial Com'r of State of New York*, 54 F. 2d 338 (C. C. A., 2nd Circ., 1931); *In re Raiken*, 33 F. Supp. 88, 89 (D. Ct., N. J., 1940). See, also, *In re Slomka*, 122 Fed. 630 (C. C. A., 2nd Circ., 1903).

3

The petitioner attempts to establish payments to it as "wages" by a semantic device. It discusses so-called fringe benefits under collective bargaining agreements. It

then points to certain fringe benefits, such as vacation pay and severance pay, which were held to constitute wages. It concludes that, since payments to a union welfare fund are also fringe benefits, such payments constitute "wages." With regard to this type of reasoning it should suffice to point out that the question at issue is the meaning of "wages" as used in the section of the Bankruptcy Act and not the meaning of "fringe benefits." With respect to the cases relied on there is a clear point of distinction in that they involved payments which the workmen were entitled to receive as an element of compensation for their labor. They were not payments to others in a manner which gave the workmen no rights except indirect and contingent ones to be received from the fund, not the employer.

The fact that these payments are not "wages" is best brought out by an example of a situation which is likely to arise if they are so held. Suppose an employee of a bankrupt employer is owed $600 in direct wages earned within three months before the date of the commencement of the proceeding and the employer also owes payments to a union welfare fund for the same period. Since the priority granted is for "wages not to exceed $600 to each claimant," the priority could not be applied to the payment due the welfare fund without reducing the amount to be paid to the employee. Even if the $600 were allocated between the employee and the fund, the amount received by the employee would be reduced. It seems evident that, in light of the obvious reasons for giving the wage priority, it was never intended to reduce the payment to the employee in return for an indirect and contingent benefit which he might receive in the future from a welfare fund. Yet, if the payments to such a fund are "wages", there would appear to be no sound ground for subordinating them to other "wages."

4

The cases under the National Labor Relations Act relied upon by the petitioner relate to an altogether different type of statute which must be interpreted in view of its purposes which are far different from those of the Bankruptcy Act. Moreover, the word "wages" in that statute must be interpreted in light of its context: it is part of the phrase "rates of pay, wages, hours of employment, or other conditions of employment" (National Labor Relations Act, §9a; 29 U. S. C. §159a).

The petitioner also relies upon the superficial resemblance between the case at bar and the case of *United States* v. *Carter*, 353 U. S. 210 (1957). That case, however, involved a substantially different statute. The question in issue was the extent of the liability of a surety on a payment bond required by the Miller Act.

As this Court pointed out (353 U. S. at p. 217):

> "The Act, however, does not limit recovery on the statutory bond to 'wages'."

The Miller Act is aimed at insuring the payment in full of all obligations arising for "labor or material" in the prosecution of work under the contracts covered by it. The breadth of its applicability is shown by *Standard Insurance Co.* v. *United States*, 302 U. S. 442 (1938), in which a similar predecessor statute was held applicable to a railroad's claim for unpaid freight due for the transportation of construction materials. The Miller Act applies regardless of the amount of the claim for labor and without limitation on the period in which it was earned.

The broad scope of the Miller Act must be contrasted with the narrow confines of the Bankruptcy Act priority provision which is limited: (1) to "wages" earned by

workmen, servants, clerks and salesmen; (2) to no more than $600 for each wage claimant; and (3) to wages earned within three months before the commencement of the bankruptcy proceeding.

Finally, it should be noted that the welfare fund involved in the *Carter* case paid insurance benefits to any employee who worked for at least 400 hours in a six-month period during the following six months even if he was no longer employed in the construction industry (210 U. S. at p. 214, fn. 1). The welfare fund in the present case gives no insurance benefits to an employee unless he continued to work for an employer covered by a collective bargaining agreement with Local 140 and eligibility for a pension required working for an employer with such an agreement for a specified number of years.

CONCLUSION

The application for a writ of certiorari should be denied.

July 22, 1957.

Respectfully submitted,

PETER CAMPBELL BROWN,
Corporation Counsel,
Attorney for Claimant
City of New York.

STANLEY BUCHSBAUM,
BERNARD H. SHERRIS,
JOHN J. LYDEN,
of Counsel.

SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 305

In the Matter of
SLEEP PRODUCTS, INC.,
Bankrupt.

LOCAL 140 SECURITY FUND,
Petitioner,
against
WILLIAM S. HACK, Trustee,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

HAROLD L. LIPTON,
Counsel for Respondent,
292 Madison Avenue,
New York 17, New York,

Of Counsel to
MEYER LINDENBAUM,
Attorney for Trustee-Respondent,
185 Madison Avenue,
New York 16, New York.

Of Counsel on Brief:
EDGAR H. BOOTH,
292 Madison Avenue,
New York 17, New York.

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IN THE

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LOCAL 140 SECURITY FUND,

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against

WILLIAM S. HACK, Trustee,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

Are employer contributions to union welfare and pension funds, pursuant to a collective bargaining agreement between the now bankrupt employer and a labor union, entitled to priority in payment, under Section 64a(2) of the Bankruptcy Act, 11 U. S. C. § 104a(2), as "wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling city salesmen * * * "?

Summary of the Argument

The decision of the court below does not conflict with the decisions of other courts of appeals.

The decision of the court below does not conflict with the decisions of this Court.

The decision of the court below does not involve an important question of federal law that has not been, and should be, settled by this Court.

POINT I

Jurisdiction on a petition for writ of certiorari is discretionary and should be exercised sparingly and with great caution.

Application has been made to this Court by Local 149 Security Fund for the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit.

The jurisdiction of this Court is invoked by the petitioner under 28 U. S. C. § 1254(1), which provides that cases in the courts of appeals may be reviewed by this Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. The judgment of the Court of Appeals was entered on March 4, 1957.

Review of judgments, decrees and orders of the United States courts of appeals in proceedings under the Bankruptcy Act by this Court by writ of certiorari, is authorized by Section 24c of the Bankruptcy Act, 11 U. S. C. § 47c.

The power of determining *what* cases shall be brought up by writ of certiorari is vested solely in the Supreme Court of the United States. *Warner* v. *New Orleans*, 167 U. S. 467, 474 (1897).

The Court, on numerous occasions, has discussed the nature of this jurisdiction that is invoked herein. Thus, in *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258 (1916), this Court said:

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *Lau Ow Bew, Petitioner,* 141 U. S. 583, 587; *In re Woods*, 143 U. S. 202; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58; *Amer. Const. Co.* v. *Jacksonville Ry.*, 148 U. S. 372, 383; *Forsyth* v. *Hammond*, 166 U. S. 506, 514; *Fields* v. *United States*, 205 U. S. 292, 296."

In *Lau Ow Bew, Petitioner*, 141 U. S. 583, 589 (1891), the Court emphasized that jurisdiction on certiorari "should be exercised sparingly and with great caution."

In fact, this Court has set down some of the criteria that it will consider in granting or disallowing a writ of certiorari. In Rule 19(1) of the Revised Rules of the Supreme Court of the United States, entitled "Considerations governing review on certiorari", it is said that review by writ of certiorari "is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

Rule 19(1) continues:

> "The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) * * *
>
> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals in the same matter; * * * or has decided

> an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The primary reasons for the granting of certiorari, as indicated by the decisions of this Court, are conflict of decision between the various courts of appeal, need to settle an important question of federal law and conflict between the decision of the court below and the decisions of this Court.

In *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 73, 74 (1955), the Court had occasion to discuss Rule 19:

> "This Rule, formulated thirty years ago, embodies the criteria, developed ever since the Evarts Act of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925. * * *
>
> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. (*Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup.

> Ct. V, VI; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst. 313.) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. * * *"

The opinion of the Court in *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163 (1923) contains the following explanation by Mr. Chief Justice Taft on the nature of review by this Court by writ of certiorari:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent. of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. * * *"

This Court commonly has consented to act as arbiter between the various courts of appeals and to resolve any conflict of decision between the circuits. At the most recent term of this Court, certiorari was granted in numerous instances to resolve such conflict. See, *inter alia*, *Rex Trailer Co. Inc.* v. *United States*, 350 U. S. 148, 149 (1956); *National Labor Relations Board* v. *Babcock and Wilcox Company*, 351 U. S. 105, 109 (1956); *United States* v. *Zucca*, 351 U. S. 91, 92 (1956); *Millinery Center Building Corp.* v. *Commissioner of Internal Revenue*, 350 U. S. 456 (1956); *Affronti* v. *United States*, 350 U. S. 79 (1956).

In addition to apparent conflict in decision between the various courts of appeals, as a basis for the granting of

certiorari, the question presented usually is one of importance. Thus, in *Mitchell* v. *Budd*, 350 U. S. 473, rehearing denied 351 U. S. 934 (1956), certiorari was sought to review judgments entered in actions brought to enjoin violation of minimum wage and record-keeping provisions of the Fair Labor Standards Act, Sections 6 and 11, 29 U. S. C. §§ 206, 211, by employers who claimed their employees were exempt from coverage under the Act. Certiorari was granted because of the importance of the problems presented and the apparent conflicts between the decision of the court below and those of the Supreme Court and of the Court of Appeals in another circuit.

Unusual or special circumstances must be present for the granting of a writ of certiorari. Although there was no conflict of decision in the circuits in *Muncie Gear Works, Inc.* v. *Outboard, Marine & Manufacturing Co.*, 315 U. S. 759, 765, 766 (1942), the Court granted certiorari "in view of the questions presented and because the patent dominates a substantial portion of an industry so concentrated in the Seventh Circuit that litigation in other circuits, resulting in a conflict of decision is unlikely."

In *Federal Communications Commission* v. *RCA Communications Inc.*, 346 U. S. 86, 89 (1953), the Court granted certiorari "because this case, the first in which the grant of duplicate radiotelegraph circuits has been challenged in the courts, presents an issue of primary importance in authorization, under the Federal Communications Act of 1934, of international radiotelegraph circuits." See also *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 702 (1945).

Indeed, a writ of certiorari issued to settle an alleged conflict in decision between two courts of appeals will be dismissed as improvidently granted, if a later examination of the court discerns that no such conflict existed. See *Layne & Bowler Corporation* v. *Western Well Works, Inc.*, 261 U. S. 387 (1923); *Keller* v. *Adams Campbell Co.*, 264

U. S. 314, 319, 320 (1924); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 178, 179 (1938); see also *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 78, 79 (1955), and cases cited in footnote 2.

In the case at bar, there is no conflict of decision between the various courts of appeals on the question presented. There is no conflict between the decision of the court below and the decisions of this Court. Nor is there presented an important question of federal law which has not been, but should be, settled by this Court.

POINT II

The decision of the court below does not conflict with the decisions of the various other courts of appeals.

The question presented by the instant application for a writ of certiorari, basically, is a very simple one—are employer contributions to union pension and welfare funds, pursuant to a collective bargaining agreement between the now bankrupt employer and the union, entitled to priority in payment, under Section 64a(2) of the Bankruptcy Act, 11 U. S. C. § 104a(2)?

This section confers priority in payment upon debts for "* * * wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen. * * *"

The question is one of relatively recent import upon the administration of bankrupt estates. There are, in fact, only five district court decisions on this question throughout the country, including the case at bar, and but one court of appeals decision, which comes in the case at bar.

In the case at bar, *Local 140 Security Fund* v. *Hack*, 242 F. 2d 375 (2d Cir. 1957), the United States Court of Appeals for the Second Circuit ruled that such employer contributions are not "wages". In so doing, the court affirmed the order of the United States District Court for the Southern District of New York in disallowing the claim filed by Local 140 Security Fund as a priority claim. The District Court decision is reported at 141 F. Supp. 463.

The first district court ruling on this question was in *Matter of Brassel*, 135 F. Supp. 827 (D. C. N. D. N. Y. 1955). There, the court held that employer contributions based on five (5%) percent of the gross monthly payroll due to a union welfare fund were not "wages" entitled to a priority under Section 64a(2) of the Bankruptcy Act. The decision in *Matter of Brassel, supra*, was followed in the case at bar.

Three subsequent decisions have been announced. In *Matter of Otto*, 146 F. Supp. 786 (D. C. S. D. Calif. C. D. 1956) the district court allowed the claims as priority claims under Section 64a(2) of the Bankruptcy Act. In *Matter of Victory Apparel Mfg. Corp.*, — F. Supp. — (D. C. N. J. 1957), decided on July 17, 1957, not yet officially reported, the New Jersey District Court followed the decision of the court below in the case at bar, in denying priority to the claims. The court also distinguished a recent decision in *In re Embassy Restaurant, Inc.*, — F. Supp. — (D. C. E. D. Pa. 1957), not yet officially reported, decided on June 28, 1957. (The decision of the New Jersey District Court is set forth in full as Appendix "A" hereinafter.) The Pennsylvania District Court, as set forth in *Matter of Victory Apparel Mfg. Corp., supra*, chose to follow the California District Court decision in *Matter of Otto, supra.*

Prior to the decision in *Matter of Brassel, supra*, there were several decisions by Referees in Bankruptcy, as out-

lined in the petition for a writ herein, at page 7, all of which apparently upheld the proposition that such employer contributions were entitled to priority in payment.

However, none of these decisions were reviewed. In *Matter of Brassel, supra*, in the case at bar and in *Matter of Victory Apparel Mfg. Corp., supra*, each Referee in Bankruptcy ruled that the claims are not entitled to a wage priority. Indeed, Referee Loewenthal in the case at bar expressly declined to follow the earlier decision of Referee Joyce in *Matter of 534 Catering Corp.* (D. C. S. D. N. Y. No. 84856, 1949), not officially reported.

The fact remains that since these claims have come under closer scrutiny within the framework of the Bankruptcy Act, there has been a clearly demonstrable effort by the courts to restrict the priorities under Section 64 of the Bankruptcy Act to those obviously contemplated by the Congress.

Matter of Otto, 146 F. Supp. 786 (D. C. S. D. Calif. C. D. 1956) can be limited to its facts and the particular collective bargaining agreement at question in that case, since the payments to the fund were expressly related to the hourly wages of each employee. Indeed, the court said, 146 F. Supp. at page 788:

> "Employer contributions to this Welfare Fund come from setting aside for such purpose specified portions (originally five cents and later six cents per hour) of cost-of-living wage increases obtained after collective bargaining following annual wage reopenings."

In addition, the California District Court, in part, rested its decision upon the theory that the employees assigned a portion of their "wages" to the welfare fund, and that such was permitted by statute in California (146 F. Supp. at p. 790).

The foregoing decisions, it is respectfully submitted, do not evidence any conflict of authority between courts of appeals. The divergence of opinion in the district courts is not over any conflict as to federal law, but rather arises from the effect of different state laws upon the resolution of this question.

It is respectfully submitted that the requisite element of conflict needed for the granting of a writ of certiorari is not present.

POINT III

The decision of the court below does not conflict with the deci ions of this Court.

There are no decisions by this Court on the question presented on this application for a writ of certiorari. Surely, then, the decision of the court below would not seem to conflict with the decisions of this Court.

However, petitioner attempts to create such a conflict by bringing the instant proceeding within the scope of this Court's decision in *United States* v. *Carter*, 353 U. S. —, 77 S. Ct. 793 (1957), No. 48 October Term, 1956, decided April 29, 1957.

Examination of the decision in the *Carter* case discloses, at best, a surface similarity. The *Carter* case involved the question of the liability of a surety on a payment bond furnished by a contractor, as required under Section 1 of the Miller Act of 1935, 40 U. S. C. § 270a(1)(2), "for the protection of all persons supplying labor and material" in the construction of federal public buildings. In the *Carter* case, when the contractor failed to pay in full the contributions to the health and welfare fund, as required by the collective bargaining agreement, the trustees of the fund sued the surety on the contractor's payment bond to recover

the balance due to the fund, plus liquidated damages, attorneys' fees, court costs and expenses. Section 2 of Miller Act, 40 U. S. C. § 270b.

In the *Carter* case, the Supreme Court ruled that the payments in question fell within "the broad but not unlimited protection" of the Miller Act (353 U. S. at —, 77 S. Ct. at 797) and that the trustees of the welfare fund "stand in the shoes of the employees and are entitled to enforce their rights" (353 U. S. at —, 77 S. Ct. at 798).

However, only by dint of much struggling and tugging at the bootstraps can the case at bar be fitted within the framework of the decision in *United States* v. *Carter*, *supra*. Aside from the fact that a different statute is being construed, it should be noted that this Court very carefully pointed out that the Miller Act does not limit recovery on the statutory bond to "wages", which is the question in the case at bar (353 U. S. at —, 77 S. Ct. at 797). The court merely found that for the purposes of the Miller Act, these contributions are as much "justly due" to the employees who have earned them as are the wages payable directly to them in cash (353 U. S. at —, 77 S. Ct. at 798, 799).

That the welfare fund was a proper claimant in the *Carter* case does not enhance its position in the case at bar since the circumstances are entirely different. In the *Carter* case, the right of the fund to sue on the performance bond was questioned. In the case at bar no one questions the *right* of the fund to file a claim for unpaid contributions. What is disputed is the contention of the fund that, essentially, it is entitled to "stand in the shoes of the employees and * * * enforce their rights" since, by the collective bargaining agreement itself, the employees have no enforceable rights (App. 13a).

Petitioner claims in its petition for the writ (p. 10) that it appears from the opinion of the court in *United*

States v. *Carter, supra,* that the collective bargaining agreement and the welfare fund involved in that case were identical with those in the case at bar, with two exceptions: (1) in *Carter,* employer contributions are based upon the number of hours worked, and (2) the contract in the *Carter* case specifically stated that employer contributions were not to be considered as "wages".

However, it would appear that the collective bargaining agreement and welfare fund involved in *United States* v. *Carter, supra,* were not identical with those in the case at bar, but rather are identical with those in *Matter of Otto,* 146 F. Supp. 786 (D. C. S. D. Calif. C. D. 1956), wherein was produced one of the district court decisions on this question allowing priority to the claims. Both cases arise in the same state—California—and apparently are the only reported cases involving collective bargaining agreements and welfare funds of this type.

Thus, it is submitted that the decision of this Court in *United States* v. *Carter,* 353 U. S. —, 77 S. Ct. 793 (1957), not only is not decisive of the question presented in the case at bar, but actually has little or no bearing thereon.

In *Nathanson* v. *National Labor Relations Board,* 344 U. S. 25, 28, 29 (1952), this Court determined that a back-pay award by the National Labor Relations Board, while not entitled to payment in full, as contended, as a debt owed to the United States (Section 64a(5) of Bankruptcy Act, 11 U. S. C. § 104a(5)), rather could be proved as a wage claim within the limits prescribed by Section 64a(2) of the Bankruptcy Act. The Court stated, 344 U. S. at pages 28, 29:

> "The Board argues that the interest of the United States in eradicating unfair labor practices is so great that the back pay order should be given the additional sanction of priority in payment. Whether

> that should be done is a legislative decision. The contest now is no longer between employees and management but between various classes of creditors. The policy of the National Labor Relations Act is fully served by recognizing the claim for back pay as one to be paid from the estate. The question whether it should be paid in preference to other creditors is a question to be answered from the Bankruptcy Act. * * * The theme of the Bankruptcy Act is 'equality of distribution' (*Sampsell v. Imperial Paper Corp.*, 313 U. S. 215, 219); and if one claimant is to be preferred over others, the purpose should be clear from the statute * * *."

In the case at bar, the question presented must be answered by reference to the Bankruptcy Act and not by resort to other federal statutes, such as the National Labor Relations Act and the Miller Act.

By virtue of the foregoing it is submitted that the decision in the court below does not create any conflict with the decisions of this Court.

POINT IV

The question of federal law presented herein is not one that need be settled by this Court.

The question presented by the petitioner is one that is most important and of special significance to the petitioner. Whether it is an "important question of federal law which has not been, but should be, settled by this court" is something else.

What is presented to the Court by the petition herein is a claim that flies in the face of the clear and unequivocal words of Section 64a(2) of the Bankruptcy Act.

The Congress under this section has accorded priority in payment to "* * * *wages and commissions*, not to ex-

ceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, *due to* workmen, servants, clerks, or traveling or city salesmen on salary or commission basis * * *."

The unpaid employer contributions herein, by their own terms, are not "wages" nor are they due to "workmen, servants, clerks, or traveling or city salesmen." That the contributions may be socially desirable and economically wise no one will dispute. But the wisdom and desirability of these payments cannot place them in a preferred status that Congress has not given them.

To repeat the words of this Court, in *Nathanson v. National Labor Relations Board*, 344 U. S. 25, 29 (1952): "The theme of the Bankruptcy Act is 'equality of distribution' (citation omitted); and if one claimant is to be preferred over others, the purpose should be clear from the statute."

It is submitted that the purpose to give to the claimant a preferred status with respect to the claim at issue herein does not rise clearly from the Bankruptcy Act. Indeed, it clearly appears that unpaid employer contributions are *not* within the area of claims favored by Section 64a(2).

In view of the clear and precise language of Section 64a(2), it cannot be said that the question presented is "an important question of federal law which * * * should be settled by this court". The very language of the statute that is relied upon by the petitioner indicates there is no question to be settled by this Court. The question has been settled by the Congress.

Further, it is not readily apparent that there is any substantial dispute that can be settled by this Court. The discussion herein on a previous point indicates that the reported decisions are not unanimous in holding that a claim such as the one presented in the case at bar is not entitled to priority under Section 64a(2) of the Bankruptcy Act.

The only divergence in opinion, aside from unreported decisions of Referees in Bankruptcy, is found in *Matter of Otto*, 146 F. Supp. 786 (D. C. S. D. Calif. C. D. 1956)—and the decision in the *Otto* case can be explained by different fact situation involved—and in *In re Embassy Restaurant, Inc.*, — F. Supp. — (D. C. E. D. Pa. 1957), not yet officially reported, which expressly followed the *Otto* case.

It is questionable whether the problem sought to be placed at issue in the case at bar can be resolved by this Court, so as to provide uniformity of decision, since widely diverse state laws have, and will, influence the decisions on this question. (Cf. *Matter of Otto*, 146 F. Supp. 786; 790 [D. C. S. D. Calif. C. D. 1956].) Decisions also will be influenced by the wording of the various collective bargaining agreements and declarations of trust, which vary from draftsman to draftsman. The ultimate resolution of the question presented in the case at bar, if such welfare and pension-fund payments are to be accorded priority under Section 64a(2) of the Bankruptcy Act, is in the hands of the Congress.

Indeed, both the District Court (141 F. Supp. at page 470) and the United States Court of Appeals for the Second Circuit (242 F. 2d at page 378) below stated that the expansion of Section 64a(2) of the Bankruptcy Act, sought in the case at bar, should be accomplished by Congressional amendment rather than judicial amendment. The claimant has not asserted its claim in the proper forum.

Judge Herlands, in his carefully reasoned opinion in the District Court below, stated (141 F. Supp. at page 470; App. 72a, 73a):

> "If the definition of wage claims within section 64, sub. a(2) is to be expanded, that result should be achieved by the method of Congressional amendment. That technique of law revision would afford the opportunity for full debate by labor unions, credit associations, bankruptcy law experts and others. It

would permit Congress to adjust, deliberately, competing economic interests and conflicting social and public policies. It would avoid uncertainty in a relatively new and expanding field of management labor relations, where there is no standardization in the form and character of union welfare funds and where there is an absence of state regulation. It would enable Congress to explore the impact of the suggested new definition upon the administration of such other statutes as the Taft-Hartley Act."

Placed in its proper context, the question presented in the case at bar does not involve an important question affecting the administration of the Bankruptcy Act. The Bankruptcy Act is clear and precise in answering this question and disallowing priority under Section 64a(2). That section of the statute does not permit the interpretation claimed by petitioner.

CONCLUSION

It is respectfully submitted that the petitioner has shown no reason for the granting of the petition for a writ of certiorari, and the petition should be denied.

Respectfully submitted,

HAROLD L. LIPTON,
Counsel for Respondent,
292 Madison Avenue,
New York 17, New York.

Of Counsel to

MEYER LINDENBAUM,
Attorney for Trustee-Respondent,
185 Madison Avenue,
New York 16, New York.

Of Counsel on Brief:

EDGAR H. BOOTH,
292 Madison Avenue,
New York 17, New York.

APPENDIX A

(Opinion of United States District Court, District of New Jersey)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Bankruptcy No. 506-55

—o—

In the Matter of

VICTORY APPAREL MANUFACTURING CORPORATION,
Bankrupt.

—o—

Appearances:

RAFF, SHERMAN & SCHEIDER, Esqs., Attorneys for Trustee, By: LOUIS SHERMAN, Esq.

CHESTER A. WEIDENBURNER, Esq., United States Attorney, Attorney for United States of America, By: JEROME D. SCHWEITZER, Esq., Assistant United States Attorney.

SIDNEY REITMAN, Esq., Attorney for Claimant; JACOB SHEINKMAN, Esq., and HENRY MITTLER, Esq. (New York Bar), of Counsel.

MODARELLI, *District Judge.*

There is a petition before the court to review an order of the Referee in Bankruptcy regarding the disallowance of certain claimed wage priorities. On May 1, 1957, Referee William H. Tallyn granted a motion of the Trustee to expunge and disallow the claim of Local 126 of the Amalgamated Clothing Workers of America for contributions to the Amalgamated Cotton Garment and Allied Industries Insurance and Retirement Funds as a priority claim for wages within the meaning of § 64(a)(2) of the Bankruptcy Act, 11 U. S. C. A. § 104(a)(2). The Trustee and the United States of America, the latter as a creditor of the bankrupt, appeared in support of the Referee's order.

Upon the filing of a petition in bankruptcy by the Victory Apparel Corporation, the appellant-claimant, Local 126 of the Amalgamated Clothing Workers of America, hereinafter referred to as "Local 126," filed a proof of claim amended to the amount of $1,695.84. This sum represents alleged wage priorities due for a 90-day period prior to the filing of the petition. The claim is predicated upon a collective bargaining agreement dated January 3, 1955, signed by the employer-bankrupt and Local 126. Pursuant to this agreement, the employer was required to make payments computed at four and one-half per cent of the gross reportable payroll of the employees in the bargaining unit. These payments were made directly to the Insurance and Welfare Funds. For the three-month period immediately preceding the filing of the bankruptcy petition, the employer failed to pay $1,695.84 to the funds; this is the amount of the claim, as noted above. The fundamental question disposed of by the Referee and now before this court is whether employer contributions to union health and welfare funds, made pursuant to a collective bargaining agreement, are entitled to priority in payment as "wages" pursuant to § 64(a)(2) of the Bankruptcy Act.

Perhaps it would be instructive to recite the statutory language which comprises the prerequisites to a valid priority.

> "a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time,

> whether or not selling exclusively for the bankrupt; * * *." Section 64(a)(2), 11 U. S. C. A. § 104(a)(2).

As noted by the recognized authority in the field of bankruptcy, "wages" for which a prior claim may be made under the statute "are closely circumscribed by express provisions of the Act," and each one of the statutory "qualifications must be satisfied before priority entails." *Collier on Bankruptcy*. (14th ed. 1941), p. 2083.

To determine whether the claim in this case satisfies the statutory definition, it is necessary to analyze the agreement negotiated by the employer and Local 126. The collective bargaining agreements, with supplements, were introduced in evidence at the hearing before the Referee and are before this court.[1] These agreements contain the usual provisions in relation to the hiring of employees, hours of employment, rates of compensation, days to be defined as legal holidays, and vacation pay. Article IX makes reference to and incorporates the supplemental agreements dealing with the insurance and retirement funds. Paragraph Three of the supplement agreement relating to the Cotton Garment Retirement Fund reads as follows:

> "3. Commencing on the pay day for the week of January 3, 1955, and weekly thereafter, the Employer shall pay to the Trustees (hereinafter called the 'Trustees') designated under an Agreement and Declaration of Trust dated as of May 1, 1950 and as amended as of March 27, 1953, a copy of which Agreement and Declaration of Trust has been exhibited to and approved by the Employer and is herein specifically incorporated by reference, sums of money determined as follows:
>
> "Two (2%) per cent of the wages payable for the preceding pay period to all the Employees."

[1] Union Exhibits 6, 7, 8, and 9.

The supplemental agreement designated Cotton Garment Insurance Fund contains the same language except that the contribution is calculated as follows:

> "Two (2%) of the wages payable for the preceding pay period to all Employees, and commencing on the pay day for the week of January 1, 1954, and weekly thereafter, the aforesaid percentage of payroll shall be increased to three (3%) per cent."

Paragraph Five of the agreements contains the following language:

> "5. No Employee or member of his family shall have the option to receive instead of the benefits provided for by the Agreement and Declaration of Trust any part of the contribution of the Employer. No Employee or member of his family shall have the right to assign any benefits to which he may be or become entitled under the Agreement and Declaration of Trust or to receive a cash consideration in lieu of such benefits, either upon termination of the trust therein created or through severance of employment or otherwise."

The Referee, in expunging the claim as a priority claim, based his decision on Judge Leibell's ruling in a similar case, *Local 140 Security Fund* v. *Hack*, 242 F. 2d 375 (C. A. 2 1957) affirming in the *Matter of Sleep Products, Inc.*, Bankrupt, 141 F. Supp. 463 (D. C. S. D. N. Y. 1956). There the Court of Appeals ruled that the payments created only a debtor-creditor obligation for something other than wages. The court concluded as follows:

> "The language of the statute granting priority to wages cannot be stretched so as to embrace this type of claim. If every type of payment made by an employer to a union welfare fund is to be given

> priority as a claim for 'wages' under Section 64, sub. a(2) of the Bankruptcy Act, that should be done through the legislative action of the Congress, and not by any judicial mislabeling of such payments as 'wages.'" 242 F. 2d at p. 378.

In a concurring opinion, Judge Hincks added that a welfare fund cannot, by any construction, be embraced in the term "workman" to whom wages are due.

The question here discussed has not been decided by our Court of Appeals. On the basis of an independent analysis of the evidence against the background of several years of judicial experience in applying the Bankruptcy Act to specific fact situations, I am impelled to subscribe to the conclusion reached in the Second Circuit Court of Appeals. To summarize my conclusion, the nature of the benefits which accrued to the employees from the funds discloses that the employer's contributions do not constitute "wages" that are "earned" by and "due to" the employees. The employer's contribution is due to independent entities, the Trustees of the respective funds; the obligation of such payment is not a debt owed the individual employee. Indeed, the employee could not sue for any arrearages. The contracts themselves contain explicit language which authorize and empower the Trustees of each fund to take whatever steps may be necessary in any proceeding at law, in equity, or in bankruptcy to effectuate the collection of any sums due.[2] This evidence corroborates the finding that the employee has no proprietary interest in the funds.[3] Furthermore, inasmuch as Local 126 rather

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[2] Union Exhibits, Paragraph 6(C) of 8 and 9.

[3] Cf., *United Marine Division, I.L.A., Local 333, A. F. of L.* v. *Essex Transportation Co.*, 216 F. 2d 410, 412 (C. A. 3 1954); a case dealing with employer payments to a pension trust for employees. In that instance it was held that the trustees were not representatives of the employees or of the employers.

belatedly rested its claim upon the ground, among others, of an assignment, I hasten to add that it must follow from what has just been said that the employee has no assignable interest, equitable or legal, in the funds. The right to assign presupposes some property interest in a res or chose in action.

The conclusions reached become all the more convincing to me when the legislative purpose of the statutory provision is reviewed. The legislative intent underlying the priority to the specified wage claims is to furnish distressed workers with a cushion of purchasing power against the impact of their employers' bankruptcy. *Collier on Bankruptcy*, (14th ed. 1941), Vol. 3, Paragraph 64.201; see also *Blessing* v. *Blanchard*, 223 F. 35 (C. A. 9 1915). This rationale does not encompass an employer's unpaid contributions to a union insurance or retirement fund.

The contentions arising from the record of this case illustrate the mischief caused when we lift a term from its context and seek to have it do service in an alien setting. Conceded, the term "wages" has been expanded to comprise severance pay, vacation pay, back pay wards under the N. L. R. A., and portal-to-portal pay. *In re Wil-low Cafeterias, Inc.*, 111 F. 2d 429 (C. A. 2 1940); *In re Public Ledger*, 161 F. 2d 762 (C. A. 3 1947); *Kavanas* v. *Mead*, 171 F. 2d 195 (C. A. 4 1948); and other decisions. But in all of these cases, the wages were due the worker directly for services rendered and were not due to another pursuant to a contract. The brief submitted by the claimant cites numerous decisions which interpret the term in the light of the particular statute then before the courts. For example, the Court of Appeals in *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247 (C. A. 7 1948), cert. denied 336 U. S. 960, examined the term "wages" in the light of Section 9(a) of the National Labor Relations Act. We may accept that court's view that so-called "fringe benefits" are subjects over which employers are

compelled to bargain collectively. The point to be noted here, however, is that the term "wages" will take its content and meaning from the particular legislative enactment. The problem, in short, calls for the application of the maxim "noscitur a sociis," which is to say that words like people, may be known by the company they keep. The general and specific words are associated with and take color from each other.

The Bankruptcy Act evinces a carefully drawn and delicately balanced pattern of priorities. As our Court of Appeals has declared in *In re Ko-ed Tavern, Inc.*, 129 F. 2d 806, 809 (C. A. 3 1942):

> "By § 64 sub. a, of the Bankruptcy Act, wage claimants are entitled to priority of payment immediately after administration expenses if, but only if, they supply the qualifications called for by the Act. If they fail to do so their claims are automatically relegated to the class of general unsecured creditors. See 3 Collier on Bankruptcy, 14th Ed., p. 2083."

Subsequent to the hearing, claimants directed my attention to the decision in the *Matter of Embassy Restaurant, Inc.*, rendered June 28, 1957, by Judge Welsh of the United States District Court for the Eastern District of Pennsylvania. As the court there noted, our Court of Appeals has not resolved the matter, and cases in other circuits are not in harmony. That being so, Judge Welsh concluded that the case of *In re Otto*, 146 F. Supp. 786 (D. C. S. D. Calif. 1956) was "most persuasive." That decision of Judge Mathes rests its holding upon the theory that the employees assigned a portion of their "wages" to the welfare fund. The court emphasized that it had to look "to the state law which rules the validity and effectiveness of any partial assignment," and concluded that partial assignment was expressly sanctioned by California statute. Cal. Civ. Code, §§ 1044, 1045. 146 F. Supp.

at 790. By contrast, the law of New Jersey is contra, *i.e.*, the courts do not enforce such assignments. *Glaser* v. *Columbia Laboratories, Inc.*, 11 N. J. Misc. 707, 167 Atl. 201 (S. Ct. 1933), affirmed 112 N. J. L. 91, 169 Atl. 693 (E. & A. 1934). The more persuasive reasoning it seems to me is that of Chief Judge Brennan in *In the Matter of Brassel*, 135 F. Supp. 827, 839 (D. C. N. D. N. Y. 1955), and of the courts in *Local 140 Security Fund* v. *Hack*, supra. As these courts have noted, it is for Congress to expand the carefully framed priority coverage of the Bankruptcy Act; it is not a proper matter for judicial legislation.

The order of the Referee is affirmed.

The foregoing opinion shall constitute findings of fact and conclusions of law, as required by Rule 52.

An order may submitted in conformity with the opinion herein expressed.